No. 89-1080-CFX
Status: GRANTED

Docketed:
January 3, 1990

Title: Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, Petitioner
v.
Robert L. Dowell, et al.

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Day,Ronald L.

Counsel for respondent: Chachkin,Norman J., Ralston,Charles S.

NOTE: See 29.2 re dock dt

Entry	Date	Note	Proceedings and Orders
1	Jan 3 1990	G	Petition for writ of certiorari filed.
3	Jan 26 1990		Order extending time to file response to petition until March 5, 1990.
4	Mar 5 1990		Brief of respondents Dowell, Robert, et al. in opposition filed.
5	Mar 5 1990		Brief amicus curiae of National School Boards Association filed.
6	Mar 7 1990		DISTRIBUTED. March 23, 1990
7	Mar 22 1990	X	Reply brief of petitioner Board of Education of Oklahoma City filed.
8	Mar 26 1990		Petition GRANTED.
			**********
10	Apr 4 1990		Order extending time to file brief of petitioner on the merits until May 23, 1990.
11	May 14 1990		Order further extending time to file brief of petitioner on the merits until June 1, 1990.
12	May 14 1990		Brief amicus curiae of Intervenors in Carlin V. Bd. of Education San Diego filed.
14	May 31 1990		Brief amicus curiae of DeKalb County Board of Education filed.
13	Jun 1 1990		Brief amici curiae of Council of the Great City Schools, et al. filed.
15	Jun 1 1990		Brief amicus curiae of Mountain States Legal Foundation filed.
16	Jun 1 1990		Brief amicus curiae of United States filed.
17	Jun 1 1990		Brief amicus curiae of Landmark Legal Foundation Center for Civil Rights filed.
18	Jun 1 1990		Brief of petitioner Board of Education of Oklahoma City filed.
21	Jun 18 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Jun 25 1990		Order extending time to file brief of respondent on the merits until July 25, 1990.
22	Jul 23 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 2, 1990. (1ST CASE)
23	Jul 25 1990		Brief amicus curiae of American Jewish Committee, et al. filed.

No. 89-1080-CFX

Entry	Date	Note	Proceedings and Orders
24	Jul 25 1990		Brief amicus curiae of National Education Association filed.
25	Jul 25 1990		Brief amici curiae of NAACP, et al. filed.
26	Jul 25 1990		Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
28	Jul 25 1990		Brief of respondents Robert Dowell, et al. in opposition filed.
27	Jul 26 1990		Two lodgings received.
30	Aug 9 1990		Appendix of (3 Vols.) filed.
29	Aug 10 1990		CIRCULATED.
31	Aug 27 1990	X	Reply brief of petitioner Board of Education of Oklahoma City filed.
32	Aug 30 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
33	Oct 2 1990		ARGUED.
34	Oct 9 1990		Citations requested of respondent during argument received and distributed

89-1080

Supreme Court, U.S.
FILED
JAN 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

VS.

ROBERT L. DOWELL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1989

QUESTIONS PRESENTED

Central to the resolution of the primary questions presented below is the answer to the most important unresolved question in desegregation law: What is the *effect* of a finding that a school system has achieved *unitary status?*

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1. Should a compulsory desegregation decree remain operative after a formerly *de jure* school system achieves unitary status?

2. Does the traditional standard for dissolution of injunctive decrees involving private parties, as enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932), govern the dissolution of school desegregation decrees?

3. What affirmative desegregative obligations, if any, does a formerly *de jure* school system have following its elimination of official discrimination and the achievement of unitary status?

4. Subsequent to the achievement of unitary status, is a school board's action to adopt an elementary neighborhood school plan which curtails compulsory busing scrutinized by the board's lack of discriminatory intent, or by the plan's racially disproportionate effect?

5. What are the proper criteria for determining whether unitary status has been maintained?

6. Did the court of appeals afford sufficient deference to the factual findings of the district court in compliance with *Anderson v. Bessemer City*, 470 U.S. 564, 573-576 (1985)?

THE PARTIES

1. The original plaintiffs and intervenors in this case were:

Robert L. Dowell, an infant under the age of 14 years of age, who sues by A.L. Dowell, his father as next friend; Vivial C. Dowell, a minor by her father, A.L. Dowell, as next friend; Edwina Houston Shelton, a minor, by her mother Gloria Burse; Gary Russell, a minor, by his father, George Russell; Stephen S. Sanger, Jr., on behalf of himself and all others similarly situated; Jenny Mott McWilliams, a minor and David Johnson McWilliams, a minor, who sue by William Robert McWilliams, their father and next friend, on behalf of themselves and all others similarly situated; Renee Hendrickson, a minor, Bradford Hendrickson, a minor, Cindy Hendrickson, a minor, and Theresa Hendrickson, a minor, who sue by Donna P. Hendrickson, as mother and next friend of each of said minors, and Donna P. Hendrickson, individually, for themselves and all others similarly situated; David Webster Verity, a minor, by and through his next friend George L. Verity, and George L. Verity and Ellen Verity, for themselves and all others similarly situated; Taejemo Danzie, a minor by and through Mrs. A.J. Danzie, her next friend, and Mrs. A.J. Danzie, for themselves and all others similarly situated.

2. The applicants for intervention who sought to reopen this case in 1985 were:

Yvonne Monet Elliot and Donnoil S. Elliot, both minor children, by and through their parent and guardian, Donald R. Elliot; Diallo K. McClarty, a minor child, by and through his parent and guardian, Donna R. McClarty; Donna Chaffin and Floyd Edmun, both minor children, by and through their parent and guardian, Glenda Edmun; Chelle Luper Wilson, a minor child, by and through her parent and guardian, Clara Luper; Donna R. Johnson, Sharon R. Johnson,

Kevin R. Johnson, and Jerry D. Johnson, all minor children, by and through their parent and guardian, Betty R. Walker; Lee Maur B. Edwards, a minor child, by and through his parent and guardian, Elrosa Edwards; Nina Hamilton, a minor child, by and through her parent and guardian, Leonard Hamilton; Jamie Davis, a minor child, by and through his parent and guardian, Etta T. Davis; and Romand Roach, a minor child, by and through his parent and guardian, Cornelia Roach.

3. The original defendants in this case were:

The Board of Education of the Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, a public body corporate; Jack F. Parker, Superintendent of the Oklahoma City, Oklahoma public schools; M.J. Burr, Assistant Superintendent of the Oklahoma City, Oklahoma public schools; Melvin P. Rogers, Phil C. Bennett, William F. Lott, Mrs. Warren F. Welch, and Foster Estes, members of the Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma; William C. Haller, County Superintendent of Schools of Oklahoma County, Oklahoma.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ____

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

VS.

ROBERT L. DOWELL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, The Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit majority acknowledges that its ruling on the effect of a unitary finding is in square conflict with *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987), and *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986).

OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is not yet reported, but is reprinted in the appendix. See App., 1a-45a (majority opinion), 46a-113a (dissenting opinion).

The opinion of the United States District Court for the Western District of Oklahoma is reported at 677 F.Supp. 1503 (W.D. Okl. 1987), and is reprinted in the appendix. See App., 1b-48b.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The equal protection clause of the Fourteenth Amendment to the United States Constitution is involved in this case.

STATEMENT OF THE CASE

Unlike any school desegregation case this Court has reviewed previously, this case involves a formerly *de jure* school system which eliminated unlawful discrimination through sustained compliance with a compulsory desegregation decree and, eight years subsequent to the achievement of unitary status, was persuaded by intervening demographic changes to adopt a neighborhood school plan, and curtail compulsory busing, for elementary students in grades 1-4. Due to residential segregation, the enrollment at 11 of the system's 64 neighborhood elementary schools was greater than 90 percent black. Respondent's challenge followed.

1. In 1972, pursuant to an earlier finding of *de jure* segregation, the district court handed down a decision ordering the Oklahoma City Board of Education to implement a desegregation plan that came to be known as the "Finger Plan". *Dowell v. Board of Education of Oklahoma City Public*, 338 F.Supp. 1256 (W.D. Okl.), *aff'd.*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). Like many other desegregation decrees governing large urban school systems, the Finger Plan employed the techniques of pairing, clustering and massive cross-town busing to integrate the schools in Oklahoma City. The district court found the Finger Plan, if implemented in good faith, would create a "unitary system," and emphasized its jurisdiction would be "continuous until it [was] clear that disestablishment of the dual system [was] complete." *Id.* at 1271.

2. After the school district had successfully implemented the Finger Plan for several years, it filed a "Motion to Close Case" on the grounds that it "[had] eliminated all vestiges of state-imposed racial discrimination in its school system, and [was] . . . operating a unitary school system." A response was filed opposing the motion.

Following an evidentiary hearing, the district court entered an order in 1977 terminating the case. In the order, the district court specifically found a "unitary system" had been "slowly and painfully accomplished" in the 16 years during which the cause had been pending.[1] *See* App., 2b.

[1] The district court in 1977 did not, as the court of appeals suggests, merely find "certain components of unitariness to have been satisfied." *See* App., 16a. As the district court itself observed in 1985, "[a]t the time [the] court totally relinquished its jurisdiction over [the] case in 1977, the court was convinced that the Finger Plan

The court recognized the school board had become "sensitized to the constitutional implications of its conduct," and that the board had "a new awareness of its responsibility to citizens of all races." *Id.* Thus, the court released the board "to pursue in good faith its legitimate policies without the continuing constitutional supervision of [the] court . . . ." *Id.* The judicial declaration that unitary status had been achieved was *not* appealed and became final.

3. During the eight years following the unitary declaration, the Oklahoma City School Board continued to implement the tenets of the Finger Plan. However, during the 13 years the plan was implemented, demographic changes slowly took place within Oklahoma City which rendered inequitable that part of the plan affecting elementary students. This became apparent in 1984, when a committee study revealed the continuation of the plan at the elementary level would, *inter alia*, substantially increase the busing burden on young black children, and subject to closure a large number of schools in a predominately black area of the school district.[2] To combat these inequities, and to increase parental involvement, the school board adopted a student assignment plan in 1984 which curtailed compulsory cross-town busing of elementary school children in grades 1-4, and assigned those children to their neighborhood school.

Like most other large metropolitan cities, Oklahoma City has some residentially segregated areas. Thus, the K-4 neighborhood school plan resulted in 11 of the district's 64 neighborhood schools enrolling 90 percent or more black students. The plan, however, incorporates features which foster desegregation. The plan's "majority to minority" transfer provision, for example, allows the parent of any elementary student assigned to a school where their race is in the majority to obtain a transfer to a school where

had been carried out in a constitutionally permissible fashion and that the school district had reached the goal of being a desegregated non-racially operated and *unitary* school system." *Dowell v. Board of Education of Oklahoma City Public Schools,* 606 F.Supp. 1548, 1554 (W.D. Okl. 1985) (emphasis added). *See also, Dowell v. Board of Education of Oklahoma City Public Schools,* 677 F.Supp. 1503, 1506 (W.D. Okl. 1987) ("this court fully intended in 1977 to restore the school board to total independence and relinquish to the board all control over the school district . . . because the Oklahoma City Schools were at that time, as they are today, operating a *unitary* system, wholly without discrimination to blacks or other minority students, faculty or staff.") (emphasis added).

[2] These inequities were directly linked to the K-5 "stand alone" school feature of the Finger Plan. Under the plan, K-5 "stand alone" schools were authorized where racial balance in a neighborhood zone either existed or was subsequently obtained as a result of demographic changes. When K-5 "stand alone" status was granted, young blacks were no longer bused into the zone to achieve racial balance, and the fifth grade was returned to the K-4 elementary school in the zone. After the plan was implemented in 197_, demographic changes slowly took place which brought more and more neighborhoods, especially those in central Oklahoma City, into racial balance. In 1984, as a result of those demographic changes there were more than a dozen elementary schools in Oklahoma City neighborhoods which had a racial balance qualifying them for K-5 "stand alone" status.

The committee study revealed that if K-5 "stand alone" status were granted to the ever increasing number of elementary schools which qualified, then the young black students, previously bused into those schools primarily from the northeast part of Oklahoma City, would have to be reassigned to more distant schools. Since most of the racially balanced neighborhoods were centrally located in Oklahoma City, the reassignment of young blacks would have been to schools located farther north, west or south. The obvious result was to increase the busing burden, in terms of time and distance, on young black children in grades 1-4. Moreover, when a "stand alone" school reacquired its fifth grade, this caused the student population at the fifth year centers located in the northeast quadrant of the district to drop. This accelerated the prospect of school closures and threatened to leave a predominately black part of the community without schools.

Respondents conceded to the existence of these inequities. *See* App., 22b-23b.

their race is in the minority.[3] This transfer option is encouraged through district-provided transportation, and is being exercised by parents in the district. *See* App., 40b. Also, the faculty and staff at all neighborhood elementary schools remain racially mixed. Under the plan, all fifth year centers, middle schools and high schools continue to be racially balanced with the use of compulsory busing.

4. Respondents filed a motion to reopen the case challenging the unitary status of the school district and the constitutional validity of the new plan. They claimed the neighborhood school plan resegregated the school district because it resulted in the creation of some racially identifiable neighborhood schools.

Following an evidentiary hearing, the district court found: (1) its unitary finding in 1977 was binding, (2) that the school district remained unitary in 1985, and (3) that the neighborhood school plan was constitutional since it was not adopted with the intent to discriminate on the basis of race. *Dowell v. Board of Education of Oklahoma City Public Schools*, 606 F.Supp. 1548 (W.D. Okl.), *rev'd.*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S.Ct. 420 (1986). Thus, the court concluded that special circumstances did not exist which warranted reopening the case.

5. The court of appeals agreed that the 1977 finding of "unitariness within the district, ... became final, and ... [was] binding upon the parties." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 107 S.Ct. 420 (1986). However, even though the Oklahoma City School District had achieved unitary status, the court of appeals concluded the school board continued to be governed in 1985 by the terms of the original desegregation order entered 13 years earlier: "[W]ithout specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of segregation." *Id.* at 1520.

[3] The "majority to minority" transfer option is a recognized desegregation tool. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971); *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F.2d 158 (10th Cir. 1967).

Although the court recognized that "[w]hen the district court terminated active supervision over the case, it acknowledged that the original purpose of the lawsuit had been achieved," *Id.*, the court viewed the case like any other in which "the injunctive order must survive beyond the procedural life of the litigation." *Id.* at 1521. Despite the unitary declaration, the court saw "no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court." *Id.* at 1520.

Since the district court had not specifically dissolved the 1972 decree in its order terminating the case, the court of appeals ruled the unitary school district had the burden of proving that the dangers prevented by the 1972 injunction had "become attenuated to a shadow," and that changed circumstances had produced "hardship so extreme and unexpected as to make the decree oppressive," if the neighborhood school plan were to survive. *Id.* at 1521. Thus, the court concluded the district court erred in searching the record for discriminatory intent.

The court of appeals reversed and remanded with instructions that the school board had the burden to prove that "changed conditions require modification or that the facts or law no longer require the enforcement of the order." *Id.* at 1523. These remand directions were handed down with the following *caveat:*

> We have confined our analysis to the narrow issue of the plaintiffs' right to reopen, therefore, our holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendant's new school attendance plan.

Id.

6. The school board filed a Petition for Writ of Certiorari in 1986 because the Tenth Circuit's ruling on the effect of a determination of unitariness was in direct conflict with a Fourth Circuit decision. In the words of the Tenth Circuit:

> The Fourth Circuit has taken a different view with which we cannot agree. In *Riddick v. The School Board of the City of Norfolk,* 784 F.2d 521 (4th Cir. 1986), the court seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect. The court makes a bridge between a finding of unitariness and voluntary compliance with an injunction. We find no foundation for that bridge. . . . A finding of unitariness may lead to many other reasonable conclusions, but it cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance.

Dowell, 795 F.2d at 1520 n. 3.

Respondents opposed certiorari due to the lack of a fully developed factual record, and the presence of procedural issues which would cloud this Court's resolution of the conflict. *See,* Brief in Opposition to Certiorari at 23-24, *The Board of Education of Oklahoma City Public Schools v. Dowell* (No. 86-326). Certiorari was denied, 107 S.Ct. 420 (1986), and the conflict left unresolved. Since that time, however, the conflict between the circuits has expanded. Additionally, the conflict is reinforced and perpetuated by the Tenth Circuit's most recent decision. *See* App., 16a-17a, 50a-51a.

7. On remand in 1987, the district court recognized that the "fundamental issue" it had to address, in light of the Tenth Circuit's remand instructions, was "whether the school board had shown a substantial change in conditions warranting dissolution or modification of the 1972 order." *See* App., 5b. Since the existence of residential segregation in some Oklahoma City neighborhoods resulted in the predominately black elementary schools respondents were challenging, the district court recognized the need to determine the causes of present residential segregation in Oklahoma City. After a thorough analysis of pertinent demographic data, relocation statistics and expert testimony, the court found the residential segregation presently existing in Oklahoma City was too "attenuated" to be linked to the unlawful segregation of the past. *Id.* at 5b-18b. Specifically, the court found the current causes of residential segregation in Oklahoma City were: (1) economics and housing affordability, (2) personal preferences and social relationships, (3) urban structure, and (4) to a limited extent, private discrimination. *Id.* at 15b-17b.

The court then examined the evidence to determine whether the school district had maintained its unitary status from 1977 to date. After review of pertinent factual information, the court analyzed the controlling decisions of this Court and concluded once again that the school district remained unitary. *Id.* at 24b-33b. Recognizing that the differentiating factor between *de jure* segregation and *de facto* segregation is the "purpose or intent to segregate," *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973), the court found that the K-4 neighborhood school plan did not undermine the unitary status of the school district because it was not adopted with the intent to discriminate on the basis of race. Rather, the court found that the neighborhood school plan was adopted for the following non-discriminatory reasons: (1) to avoid increased busing burdens on young black people, (2) to avoid the closure of fifth-year centers in the northeast quadrant, and (3) to increase parental and community involvement. *See* App., 20b-21b, 26b-27b.

Having the benefit of the facts related to the foregoing issues, the district court then addressed the issue of whether the 1972 decree should be dissolved. The court concluded that the facts and law no longer required enforcement of the 1972 decree. In the process of dissolving the decree, the district court relied upon the teaching of *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 22, 24 (1971): it is the dismantling of the "dual school system" which is the target of a desegregation case, and the remedy is designed to operate only during the "interim period" when remedial adjustments are being made to eliminate the dual system. App., 35b, 38b. The Court

found that the purposes of this litigation had been fully achieved, and that the "substantial change in conditions," which over time resulted in the elimination of illegal discrimination, was precisely the change which compelled dissolving the 1972 decree. *Id.* at 35b-39b. Respondents appealed.

8. The Tenth Circuit, in a 2-1 decision, reversed and remanded. The majority "approach[ed] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." *See* App., 3a. The majority took "the simple position that an injunctive order entered in a school desegregation case has the same attributes as any other injunctive order issued by a federal court." *Id.* at 15a. It concluded, therefore, that the standard articulated in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions"), governed the dissolution of the desegregation decree. *See* App., 11a-12a.

The majority of the panel opined the declaration of unitariness did not fit into the formula because "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate," and "the court's jurisdiction extends beyond the termination of the wrongdoing." *Id.* at 13a (omitting citations). Thus, "[t]he condition that eventuates as a function of the injunction (unitariness) cannot alone become the basis for altering the decree absent the *Swift* showing." *Id.* To reach this conclusion, the court reiterated and perpetuated the conflict between the circuits:

> Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986).

Id. at 16a-17a.

Notwithstanding the unitary declaration, the panel majority found the board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the *dual* system and its effects." (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 538) (emphasis added) *Id.* at 42a. The majority, therefore, did not focus on whether the plan was "non-discriminatory".[4] *Id.* at 41a. Finding the board did not meet its burden under *Swift* to dissolve the decree, the court remanded the case with instructions, *inter alia*, to take evidence on alternatives to "maintain racially balanced elementary schools." *Id.* at 44a.

The dissent found three primary flaws in the majority's reasoning. First, that the *Swift* standard generally applied in the context of terminating anti-trust injunctions, or other commercial injunctions between private parties, is unwarranted and impractical in school desegregation

[4] Even though the court concluded that discriminatory intent was not the pertinent inquiry, it nonetheless ruled that the district court entered clearly erroneous findings on the question of intent in the absence of an argument from respondents to that effect. The court rejected the plan because it "restore[d] the effects of past discriminatory intent remedied by the decree by recreating racially identifiable elementary schools, overlooking school capacity problems, and failing to address faculty imbalance." App., 41a-42a.

cases where the important values of local control of public school systems dictate that a federal court's regulatory control not extend in perpetuity. *See* App., 60a-65a.

Next, the dissent questioned the inadequate recognition the majority gave to the legal effect of the school district's unitary status. Recognizing the conflict between the circuits on this issue, the dissent sided with *Riddick v. School Bd.*, 784 F.2d 521, 535, 534-39 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986), and *United States v. Overton*, 834 F.2d 1171, 1176, 1174-77 (5th Cir. 1987), to reach the conclusion that once a school district becomes unitary, continued federal control should cease. *Id.* at 50a-51a. Aware that "the differentiating factor between *de jure* and . . . *de facto* segregation . . . is purpose or intent to segregate," *id.* at 49a (quoting *Keyes*, 413 U.S. at 208), the dissent reasoned that "plaintiffs were required to demonstrate that the district had lost its unitary status through purposefully segregative school board actions." *Id.* at 50a.

Finally, the dissent was quite critical of the insufficient deference the majority afforded to the factual findings of the district court concerning segregative intent.

> This court's approach to the school board's evidence is to judge it against an improper legal standard given the unitary status of the school district. This court then compounds the problem by searching the record for conflicting evidence and holding the school board to an impossible standard of proof which does not allow the school board to prevail if there is any conflicting evidence. This practice is di-

rectly contrary to the standard by which we carry out our appellate function. *Anderson*, 470 U.S. at 573-576.

Id. at 99a.

In sum, the dissent concluded that the majority ruling "denie[d] the essence of unitariness," and appeared to "impose greater substantive burdens on a school board than before the unitary finding." *Id.* at 74a. Recognizing that the school district "proved non-segregative purpose to the district court," the dissent was of the view that the school district should not be monitored by the court in perpetuity. *Id.* at 113a. The dissent would have lifted the original desegregation decree and entrusted the schools to local control. *Id.*

REASONS FOR GRANTING THE WRIT

In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 6 (1971), this Court granted certiorari to assist schools and courts across the country, then struggling under the mandate to dismantle dual systems, by "defining in more precise terms . . . the scope of the duty of school authorities and district courts in implementing *Brown I*." Through the guidance provided in *Swann*, scores of school districts subsequently accomplished the affirmative duty to desegregate and achieved unitary status.

This Court, however, has not yet specifically ruled on the meaning of unitariness and its effect on extant decrees. Lower courts are addressing this important issue with divergent results. Eighteen years following *Swann*, schools and courts across this country need further guidance from this Court defining the legal significance of unitary status. It is beyond serious dispute that this is the most important unresolved constitutional question concerning school desegregation.

I. THE CONFLICT BETWEEN THE CIRCUITS ON THE MEANING OF UNITARY STATUS MUST BE RESOLVED.

The Tenth Circuit's decision is in direct conflict with a factually indistinguishable case decided by the Fourth Circuit, *Riddick v. School Bd of City of Norfolk*, 784 F.2d 521 (4th Cir.), *cert denied*, 107 S.Ct. 420 (1986). *See* App., 16a-17a. The Norfolk school system in 1975 was found unitary in an order which terminated jurisdiction without dissolving the desegregation decree. Several years later the Norfolk board adopted a neighborhood elementary school plan which curtailed compulsory busing of students in grades 1-6. Because of residential segregation, a number of Norfolk's neighborhood schools were racially identifiable. The Norfolk plan, like the Oklahoma City plan, was prompted by demographic changes, and incorporated a "majority to minority" transfer provision. The plan was unsuccessfully challenged in district court, and the principle issue on appeal was the effect of the unitary finding upon the challenge to the new plan. *Id.* at 534.

Recognizing the pronouncement in *Swann* that unitary status signifies the complete elimination of unlawful segregation, the Fourth Circuit ruled "once the goal of a unitary system is achieved, the district court's role ends" *Id.* at 535, and held that the order finding Norfolk unitary "returned control of the city's schools to the school board." *Id.* at 538.

Deciding the case under the *de facto/de jure* distinction recognized in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the Fourth Circuit ruled that judicial involvement does not "continue in perpetuity to prevent resegregation absent a showing of intent to discriminate." *Riddick*, 784 F.2d at 534. Thus, the court decided the district court correctly placed the burden upon those attacking the neighborhood school plan to prove the school board adopted the plan "with an intent to discriminate on the basis of race." *Id.*

The Tenth Circuit in 1986 was aware of *Riddick*, but could not distinguish it. It stated *Riddick* "seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1520 n. 3 (10th Cir. 1986). The Tenth Circuit simply concluded that "[t]he Fourth Circuit has taken a different view with which we cannot agree." *Id.*

In its most recent decision, the Tenth Circuit relied upon its previous decision in *Dowell*, and recognized that its ruling now conflicts not only with *Riddick*, but also with a recent Fifth Circuit decision:

> Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986).

App., 16a-17a.

The decisions of the Tenth, Fourth and Fifth Circuits squarely conflict on the question of when judicial control should cease in a desegregation case.

The Tenth Circuit holds that the pertinent inquiry is not whether unitary status has been achieved, but rather, whether the *Swift* standard has been met. On the other hand, the Fourth Circuit holds the achievement of unitary status, signifying the elimination of unlawful segregation, is the important inquiry, despite the absence of an order dissolving the original decree. Under the Fourth Circuit's analysis, parties challenging a unitary school system's neighborhood school plan have the burden of proving discriminatory intent. Yet, under the same circumstances, the Tenth Circuit's analysis discounts the question of intent and places the burden on the unitary school district to justify the plan's racially disproportionate effect. *Riddick* and *Dowell* could not be more diametrically opposed.

The Fifth Circuit in *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987), analyzed the conflict between the Tenth and Fourth Circuits, and sharply rejected *Dowell*:

> The difficulty with *Dowell's* approach is that it denies meaning to unitariness by failing ever to end judicial superintendence of the schools . . . .
>
> We see *Dowell's* effort to declare a school system to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness . . . .
>
> In sum, the idea that a school district can be declared unitary and yet be answerable to the

> federal courts for failure to abide by desegregation plans, regardless of segregative purpose, is at war with itself.

Overton at 1175, 1176, 1177.

The Fourth and Fifth Circuits are not alone. The First and Ninth Circuits also hold "that current desegregation law does not envision continued federal jurisdiction in the affairs of local school districts in perpetuity once a school district becomes unitary."[5] *See* App., 50a-51a (dissent).

The importance of the conflict between the circuits, and the need to resolve it, is perhaps best illustrated by the attention it has received from the legal community. *See, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 Harv.L.Rev. 653-54 (1987) ("It is unclear, however, whether the school board bears any burden of justifying challenged actions that reintroduce racial separation after a court declares the formerly dual school system unitary and relinquishes jurisdiction. The United States Supreme Court has recently refused to resolve seemingly contradictory federal appeals court holdings on this issue [citing the denial of certiorari in *Riddick* and *Dowell*]. Because the burden allocation can, in cases where the intent evidence is not dispositive, determine the outcome, the question is of enormous importance.");

[5] *See Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("Although the [Supreme] Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities."); *Spangler v. Pasadena Bd. of Educ.*, 611 F.2d 1239, 1241 (9th Cir. 1979); *Id.* at 1247 ("Retention of jurisdiction where there is no longer a demonstrated need to monitor compliance may defeat important governmental and personal interests. . . . There is no warrant for retaining further jurisdiction in the case, and the district court should enter an order relinquishing all further jurisdiction.") (Kennedy, J. concurring).

Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La.L.Rev. 789, 815 (1988) ("The conflict between the circuits poses interesting issues as to the nature of permanent injunctions and continuing jurisdiction. . . ."); Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 Okla.L.Rev. 519, 553 (1987) ("The disagreement between the Fourth and Tenth Circuits in *Riddick* and *Dowell* in regard to how a finding of unitary status affects earlier desegregation orders suggests the need for a common procedure for courts to follow in relinquishing control over school board decisions."); Beard, *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 La.L.Rev. 1239, 1240 (1989) ("A critical issue in desegregation law is how a school district once found to have been *de jure* segregated becomes 'unitary'. This issue is already of considerable practical importance and will become more so as a greater number of school districts begin to move for recognition of their unitary status. Yet the issue has never been clearly addressed by the Supreme Court, and has only recently received attention in the lower courts." [citing *Overton, Dowell* and *Riddick.*]); *See also* Note, *The Unitariness Finding and Its Effect on Mandatory Desegregation Injunctions*, 55 Fordham L.Rev. 551, 554 n. 12 (1987) (focusing on "the conflicting views of the effect of a unitariness finding as recently articulated by the Court of Appeals for the Fourth and Tenth Circuits."); Note, *The Unitariness Dilemma: The First Circuit's Attempt to Develop a Test for Determining When a System is Unitary*, 66 Wash.U.L.Q. 615, 625 n. 75 (1988) ("Without guidance from the Supreme

Court, [the Fourth and Tenth] circuits reached opposite conclusions on the issues of burden of proof and continued control of the system after a declaration of unitariness by the district court."); Note, *Unitariness and Busing: Placing the Burden of Proof for Obtaining Judicial Review When a School Board Stops Busing,* 92 Dick.L.Rev. 437, 459-60 (1988) ("Elementary school busing, as Justice Powell indicated in his separate opinion in *Keyes*, is not a wonder drug; busing young children has side-effects which school systems seek to avoid. *Riddick* and *Dowell* exemplify this principle and indicate that the time has come for the courts to reevaluate the busing remedy.").

The conflict is now ripe for resolution. The record in this case is now well developed factually, and the procedural cloud present when certiorari was denied in 1986 no longer exists. The risk of inconsistency can only increase if the lower courts are left to pick and choose between the squarely conflicting rules which presently exist. How the equal protection clause of the fourteenth amendment is applied simply should not depend on the part of the country where one lives.

II. BY HOLDING THE *SWIFT* STANDARD GOVERNS THE DISSOLUTION OF A REMEDIAL DECREE, THE TENTH CIRCUIT RULED ON AN IMPORTANT UNSETTLED QUESTION OF CONSTITUTIONAL LAW IN A MANNER INCONSISTENT WITH PRINCIPLES PREVIOUSLY ANNOUNCED BY THIS COURT.

Addressing the unresolved question of when a desegregation case should end "has become a

practical necessity." *See* Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal,* 86 Colum.L.Rev. 728, 790 (1986).

The Tenth Circuit decided this important question without giving any weight to the achievement of unitary status. It relied upon the standard set forth in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), an anti-trust case, for the proposition that, despite unitariness, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" warrants dissolution of a desegregation decree. *See* App., 11a-12a. However, as the dissent correctly noted, "[v]irtually all of the cases relied upon by [th]e court in its application of *Swift* involve unsuccessful attempts to obtain, modify or dissolve injunctions which forbid or limit private commercial conduct." *See* App., 62a.

Swift and its progeny are simply ill-suited for application in desegregation cases involving governmental agencies where sensitivity to the importance of local control is essential.[6] Justice (then Judge) Kennedy explained the inapplicability of *Swift* to a district court's termination of equitable jurisdiction in school desegregation cases in *Spangler v. Pasadena Bd. of Educ.*, 611 F.2d 1239, 1245 n. 5 (9th Cir. 1979):

> *Swift* involved the efforts of anti-trust defendants who had entered into a consent decree prohibiting anti-competitive actions to modify

[6] It appears the court of appeals drifted off course by concluding that "Fed.R.Civ.P. 60(b) codifies th[e] [*Swift*] standard." *See* App., 13a. Rule 60(b), however, does not codify substantive law. *See,* Fed.R.Civ.P. 60(b) advisory committee note (1946 amendment) ("It should be noted that Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.")

> the decree by lifting some of its prohibitions. It is doubtful the case supports the district court's retention of jurisdiction. *Swift* establishes general criteria for dissolution or modification of prohibitory injunctions against private wrongdoers. More recent Supreme Court desegregation decisions have established specific criteria for dissolution of regulatory injunctions imposed upon public school authorities. . . . [T]hese criteria recognize (1) that the proper function of a school desegregation decree is remedial, and (2) necessary concern for the important values of local control of public school systems dictate that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. *See, Milliken v. Bradley* [*Milliken II*], . . . 433 U.S. [267,] at 280-82, 97 S.Ct. 2749 [(1977)].

See also, Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La.L.Rev. 769, 828 (1988) (The *Swift* "articulation has been criticized as having 'language perhaps too strongly adverse to the possibility of modification.' In any event, that standard probably does not apply to school desegregation decrees. . . ." [quoting Restatement (2d) of Judgments, Reporter's Note on Section 73, at 201 (1982)]); *Moneystore, Inc. v. Harriscorp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) (Posner, J., concurring) (observing the *Swift* standard, applicable in litigation over property rights, is ill-suited in litigation designed to reform public agencies).

The Tenth Circuit's application of the *Swift* standard to a unitary school district overlooks the fact that the constitutional violation has been

remedied. *See* App., 13a. ("The condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing."). This approach confuses the remedy with the constitutional violation. As the Fifth Circuit observed in *Overton*:

> [C]ontinuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable. Stated another way, the constitutional violation is purposeful separation of races in public education. The mix that would have occurred but for the racism is a judicially created hypothetical. We have insisted upon matching that model of a unitary desegregated status as a remedy for the wrong. Refusing, after the match, to allow a school district to vary from that model unless it proves its 'non-segregative' purpose confuses wrong and remedy.

834 F.2d at 1176-77.

In applying the *Swift* standard to the dissolution of a desegregation decree, the Tenth Circuit simply failed to recognize that "[t]he issues involved in terminating a remedy generally mirror those a court faces when initiating a remedy." *See* Gewirtz, *supra* at 790. Thus, the court overlooked the import of "local" control, *Milliken v. Bradley*, 433 U.S. 267 at 280-82 (1977), and neglected to recognize that the remedy is designed "to repair the denial of a constitutional right," and to operate only during the "interim period" when remedial adjustments are being made to eliminate the dual school system. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16, 28 (1971).

Indeed, *Swift* itself distinguishes "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Swift*, 286 U.S. at 114.

The Tenth Circuit's imposition of the *Swift* standard can only serve to have a chilling effect on legitimate changes in educational policy and to defeat important governmental and personal interests. The school board will be obligated under the governance of a continuing decree to take racial factors into account in making important policy decisions long after discrimination has been eliminated and unitary status has been achieved. The most significant problem with *Swift's* mandate for continued judicial superintendence is the lack of judicial accountability for the results.

The facts in this case provide this Court full opportunity to decide when a desegregation decree should be lifted. The decree in Oklahoma City was implemented in 1972. Unitary status was achieved in 1977, and the board continued to implement the decree until 1985 when it became oppressive at the elementary level. In sum, an entire generation was educated under the governance of the Finger Plan. The question of when a desegregation decree should be lifted is an important unsettled question, intertwined with the meaning of unitariness itself, which warrants independent review by writ of certiorari.

III. THE COURT OF APPEALS SO FAR DEPARTED FROM ACCEPTED PRACTICE AS TO WARRANT THIS COURT'S SUPERVISION.

When respondents appealed the district court's decision, they did not assert that the court's finding on the lack of discriminatory intent was "clearly erroneous". *See*, Docketing Statement at 5. Notwithstanding, the court of appeals struck down the district court's intent finding on this basis.

There were two permissible views of the evidence in this case. Indeed, the panel majority recognized there was "evidence to facially support the district court's findings." *See* App., 41a. In *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), this Court ruled that where "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

A dispassionate reading of the dissenting panel member's opinion demonstrates without question that the majority overstepped the bounds of its duty under Fed.R.Civ.P. 52(a) by reweighing the evidence. *See* App., 53a-60a, 86a-113a.

The *Anderson* standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced it would have decided the case differently." 470 U.S. at 573-576. Such a grave departure from this standard is additional justification for granting the writ.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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December, 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1067

ROBERT L. DOWELL, an infant under the age of 14 years of age, who sues by A.L. Dowell, his father, as next friend,
Plaintiff-Appellant,

VIVIAN C. DOWELL, a minor, by her father, A.L. Dowell, as next friend; EDWINA HOUSTON SHELTON, a minor, by her mother, Gloria Burse; GARY RUSSELL, a minor, by his father, George Russell; STEPHEN S. SANGER, on behalf of himself and all others similarly situated,
Plaintiffs-Intervenors-Appellants,

v.

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA CITY, OKLAHOMA, a Public Body Corporate; JACK F. PARKER, Superintendent of the Oklahoma City, Oklahoma Public Schools; M.J. BURR, Assistant Superintendent of the Oklahoma City, Oklahoma Public Schools; MELVIN P. ROGERS, PHIL C. BENNETT, WILLIAM F. LOTT, MRS. WARREN F. WELCH, FOSTER ESTES, Members of The Board of Education of Oklahoma City Schools, Independent District No. 89, Oklahoma County, Oklahoma; WILLIAM C. HALLER, County Superintendent of Schools of Oklahoma County, Oklahoma,
Defendants-Appellees,

JENNY MOTT MCWILLIAMS, a minor, and DAVID JOHNSON MCWILLIAMS, a minor, who sue by William Robert McWilliams, their father and next friend, on behalf of themselves and all others similarly situated; RENEE HENDRICKSON, a minor, BRADFORD HENDRICKSON, a minor, TERESA HENDRICKSON, a minor, and CINDY HENDRICKSON, a minor, who sue by Donna P. Hendrickson, as mother and next friend of each of

said minors; and DONNA P. HENDRICKSON, Individually, and for themselves, and all others similarly situated,

Defendants-Intervenors-Appellees,

DAVID WEBSTER VERITY, a minor, by and through his next friend, George L. Verity; GEORGE L. VERITY and ELLEN VERITY, for themselves and all others similarly situated; TAEJEMO DANZIE, a minor, by and through Mrs. A.J. Danzie, her next friend; and MRS. A.J. DANZIE, for themselves and all others similarly situated,

Intervenors.

[Filed October 6, 1989]

Appeal from the United States District Court
For the Western District of Oklahoma
D.C. No. CIV-61-9452-B

Norman J. Chachkin (Julius L. Chambers and Janell M. Byrd, New York, New York; Lewis Barber, Jr. of Barber and Traviolia, Oklahoma City, Oklahoma; and John W. Walker and Lazar M. Palnick of John W. Walker, P.A., Little Rock, Arkansas, with him on the briefs), New York, New York, for Appellants.

Ronald L. Day of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for Appellees.

Wm. Bradford Reynolds, Assistant Attorney General, David K. Flynn and Mark L. Gross, Attorneys, Department of Justice, on the briefs for the United States as Amicus Curiae.

Before SEYMOUR, MOORE, AND BALDOCK, Circuit Judges.

MOORE, Circuit Judge.

Since its genesis, this litigation has sought to eradicate the effects of an official policy of racial segregation in the public schools of Oklahoma City,

Oklahoma, and assure that each child enrolled in an Oklahoma City School enjoys the same right to a public education. We are now at a crossroad in the substantive and procedural life of this case and must decide whether, after our last remand, the district court followed the correct path, terminating its prior decree and finding a new student assignment plan implemented under that decree constitutional. *Dowell v. Board of Educ. of Okla. City Pub. Schools*, 677 F. Supp. 1503 (W.D. Okla. 1987). We approach this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies. We believe that the law in this area is unambiguous, and simply because the roots of the matter lie in school desegregation, there is no reason to depart from the longstanding principles which form the structure of that law. Upon our review, we conclude the trial court did not follow the proper path and reverse the judgment dissolving the 1972 injunctive decree. We remand the case for modification of the decree consistent with this order.

I. Background

We have previously summarized the history of this case, *Dowell v. Board of Educ. of Okla. City*, 795 F.2d 1516, 1517, n.1 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986), tracing its metamorphosis from filing in 1961 to the generation of an equitable remedy in 1972. *Dowell v. Board of Educ. of Okla. City Pub. Schools*, 338 F. Supp. 1256 (W.D. Okla. 1972). In 1986, when last before us, plaintiffs urged review of the district court's refusal to reopen the case to consider their petition for enforcement of the court's prior injunctive decree. The motion to reopen was triggered by the implementation of a new student assignment plan in 1984.

Until that time, defendants, the Board of Education of the Oklahoma City Public Schools, school officials, and individual board members, (the Board or defendants) operated the Oklahoma City School Dis-

trict (the District) under the Finger Plan, a court ordered desegregation plan prepared by Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College and authority on issues of school desegregation.[1] Under the Finger Plan, attendance zones were redesigned so that high schools and middle schools enrolled black and white students. Black elementary students in grades 1 through 4 were bused to previously all white elementary schools while majority black elementary schools were converted into 5th-year centers with enhanced curricula. Black fifth graders then attended the 5th-year center in their neighborhood, while white fifth graders were bused for the first time into black neighborhoods to attend class. Excepted from the Finger Plan were certain schools enrolling grades K-5, which were designated "stand alone." These schools were located in neighborhoods that were racially balanced. Kindergarten children attended their neighborhood elementary school unless their parents chose to send them to another school to join a sibling or be closer to the parent's workplace. Aside from minor alterations necessitated, for example, by a school's closing, the Board maintained the District under the Finger Plan's basic techniques of pairing, clustering, and compulsory busing, even after the district court declared the District unitary and terminated the case. *Dowell v. School Bd. of Okla. City Pub. Schools*, No. CIV-9452, slip op. (W.D. Okla. Jan 18, 1977).

Seven years later, the Board adopted a new student assignment plan, the Student Reassignment Plan, (the Plan), which was implemented for the 1984-85 school year. The Plan eliminated compulsory busing in grades 1 through 4 and reassigned elementary students to their neighborhood schools. A "majority to minority" transfer option (M & M) was retained to

[1] The Finger Plan was adopted only after the Board failed to produce an acceptable desegregation plan to the district court.

permit elementary students assigned to a school in which they were in the majority race to transfer to one in which the student would be in the minority. Fifth-year centers would remain throughout the District and, like the middle schools and high schools, would continue to maintain racial balance through busing. The Plan created the position of an "equity officer" assisted by an equity committee to monitor all schools to insure the equality of facilities, equipment, supplies, books, and instructors. *Dowell v. Board of Educ. of Okla. City Pub. Schools*, 606 F. Supp. 1548, 1552 (W.D. Okla. 1985). The Plan professed to maintain integrated teaching staffs in line with the District's affirmative action goal. As a consequence of the Plan, eleven of the District's sixty-four elementary schools enrolled 90%+ black children. Twenty-one elementary schools[2] became 90%+ white and non-black minorities.[3] Thirty-two elementary schools remained racially mixed.

In February 1985, plaintiffs filed a motion to intervene and reopen the case claiming the Board unilaterally abandoned the Finger Plan. Although the record indicated the subsequent hearing was limited to "the question of whether this case shall be reopened and the applicants allowed to intervene shall be tried and disposed of," *Dowell*, 795 F.2d at 1523 (emphasis omitted), the district court received evidence on the constitutionality of the Plan and disposed of all of the substantive issues defendants raised. The district court concluded the Plan was constitutional and found no special circumstances justifying relief under Fed. R. Civ. P. 60(b) to support reopening. *Dowell*, 606 F. Supp. at 1557.

We reversed, holding the court abused its discretion in failing to reopen the case and prematurely

[2] These numbers are taken from Def. Ex. 63. Schools with less than 10.7% black population were included in the total.

[3] In Oklahoma City, Indian, Spanish, and Oriental children comprise the non-black minority population counted.

reached the merits of the Plan's constitutionality without permitting plaintiffs the opportunity to support their petition for enforcement of the mandatory injunction which the court had never dissolved or modified. *Dowell*, 795 F.2d at 1523. Key to our disposition was the reassertion of the parties' burden of proof under Fed. R. Civ. P. 60(b).[4] We stated that on remand, the plaintiffs, beneficiaries of the original injunction, only have the burden of showing the court's mandatory order has been violated. "The defendants, who essentially claim that the injunction should be amended to accommodate neighborhood elementary schools, must present evidence that *changed conditions require modification* or that the facts or law no longer require the enforcement of the [1972] order." *Id.* (citation omitted) (emphasis added). Nothing in this disposition touched on the underlying constitutional issues. "[O]ur holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendants' new school attendance plan." *Id.* at 1523. Remand was confined to a determination of "whether the original mandatory order will be enforced or whether and to what extent it should be modified." *Id.*[5]

During the eight-day hearing on these remand instructions, defendants[6] introduced a golconda of testimony and exhibits to establish their position that substantial demographic changes in the District ren-

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[4] Fed. R. Civ. P. 60(b) states:

On motion and upon such terms as just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . .

[5] The dissent takes several opportunities to disagree with this unreversed holding. Nonetheless, it is the directive with which this court remanded the case, and the trial court was not free to depart from our mandate. Moreover, the holding is the present law of this circuit.

[6] Although the stipulation was not found in the pretrial order, we presume the parties agreed the injunction had been violated because defendants presented their evidence of substantial change first.

dered the Finger Plan inequitable and oppressive. The inequity, the Board maintained, surfaced primarily in the burgeoning number of schools that qualified for stand-alone status, thus necessitating that black children be transported greater distances to attend racially balanced elementary schools. Defendants' expert, Dr. William A. Clark, a specialist in population geography, testified on the migration and mobility of the black population in the District. Dr. Clark was satisfied that the residential pattern that developed in the District since the implementation of the Finger Plan was not a vestige of what had occurred thirty-five or forty years before and that "black preference" accounted for the dispersal of the black population throughout the District. While recognizing that socioeconomic factors must be considered in any housing decision, Dr. Clark maintained that the most significant motivation was preference.

Dr. Finis Welch, an economist at the University of California, offered testimony on studies he conducted of the dissimilarity and exposure indices of residential areas on which the Plan was based. Dr. Welch opined that the increasing number of stand-alones would "draw down" the 5th-year centers which, he projected, would result in closing more schools in the northeast quadrant, the area of central Oklahoma City which remains majority black.

Three Board members testified about their involvement in the preparation of the Plan. The District's superintendent, several black school administrators, and various members of the community offered their views on an array of issues, from linking neighborhood schools to black achievement, to the value of parental involvement in a child's education. Ms. Susan Hermes, a member of the committee which prepared the Plan, stated that she believed "educationally it is better for a child to have family nearby." (R. IV, 390). Over plaintiffs' objection, counsel for the Board asked each witness if he or she believed the

District remained unitary after implementation of the Plan. The court, also over plaintiffs' objection, asked key defense witnesses if the Plan was adopted with discriminatory intent.

Through cross-examination and in its presentation of evidence, plaintiffs offered a contrasting analysis of the issues of demographic change, the impact of the Plan, and the Board's alternative approaches of the Effective Schools Program, increased parental participation in PTA, and equity supervision. Dr. John Finger, who had prepared the original plan, rejected each of these features of the new Plan noting that Effective Schools and increased parental participation deal with different problems and cannot be substituted for a desegregated education. Dr. Gordon Foster, a professor of education at the University of Miami, testified about a student assignment plan he had prepared for plaintiffs to solve the perceived inequities of busing under the Finger Plan.

In its subsequent order, the district court initially observed it was "now aware that it should have dissolved the injunction in 1977, as pointed out in the Circuit opinion, because the Oklahoma City schools were at that time, as they are today, operating as a unitary system, wholly without discrimination to blacks or other minority students, faculty or staff." *Dowell*, 677 F. Supp. at 1506. Nevertheless, the court apprehended the command we framed in our prior review. "The fundamental issue the court must address is whether the School Board has shown a substantial change in conditions warranting dissolution or modification of the 1972 Order." *Id.* Relying on the testimony of Drs. Clark and Welch, the court concluded:

> [T]he Oklahoma City Board of Education has taken absolutely no action which has caused or contributed to the patterns of residential segregation which presently exist in areas of Oklahoma City. If anything, the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City.

Id. at 1512.

Thus, unlinking the Board from existing residential segregation and satisfied that demographic changes rendered the Finger Plan inequitable,[7] the court proceeded to examine the constitutionality of the Plan. Acknowledging that "[a] once unitary school district may lose its unitary status by partaking in intentionally discriminatory acts creating de jure segregation," *id.* at 1515, the court set forth the guidelines established in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which [was] intended to, and did in fact discriminate against minority pupils, teachers, or staff.

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977).

The court reviewed the evidence and concluded that not only did legitimate nondiscriminatory factors motivate the adoption of the Plan, but, also, that the Plan currently maintained a unitary district which enjoyed increased parental and community involve-

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[7] To reach this conclusion, the district court accepted defendants' prediction that as new areas of the district qualified for "stand-alone" status, the distances which black students in grades 1-4 would have to be transported to attend integrated schools would increase. Fifth-grade centers in the northeast quadrant would then close because of the consequent diminished enrollment.

ment and included safeguards such as the equity officer and Effective Schools Program to insure continued unitariness. While the court entertained plaintiffs' contention that the Plan did have a disproportionate impact upon some blacks in the District, it concluded that racial imbalance in the schools, without more, does not violate the Constitution, citing *Milliken v. Bradley*, 433 U.S. 267 (1977). "It follows that a school board serving a unitary school system is free to adopt a neighborhood school plan so long as it does not act with discriminatory intent." *Dowell*, 677 F. Supp. at 1518. The court rejected plaintiffs' claim that the Plan is a step toward a dual school system as "ludicrous and absurd." *Id.* at 1524. In light of these findings of fact and conclusions of law, the district court determined the Foster Plan, plaintiffs' proposed modification of the 1972 decree, was neither feasible nor necessary.

Plaintiffs appeal this order, contending essentially that the district court misapplied the instructions on remand and misperceived the function of the unitary status achieved in 1977 to be a post-decree change in circumstances warranting dissolution of the injunction. In dissolving the injunction, plaintiffs urge the court abused its discretion by relying on clearly erroneous findings of fact.

II. Standard of Review

At the outset, we must underscore this case involves an injunction upon which relief was sought pursuant to Fed. R. Civ. P. 60(b). *Dowell*, 795 F.2d at 1522.[8] Thus, our review focuses on whether the district

[8] The dissent takes the position that because this case involves the desegregation of a public school system, the usual standards applicable to federal law on injunctive remedies are inapposite. The Supreme Court has said, "However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

court abused its discretion in granting the Board's motion to dissolve the injunction and denying plaintiffs' motion to modify the relief. On appeal we will not disturb the district court's determination except for an abuse of discretion. *Securities and Exch. Comm'n v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677 (10th Cir. 1988). The district court's exercise of discretion, however, must be tethered to legal principles and substantial facts in the record. *Evans v. Buchanan*, 582 F.2d 750, 760 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980). "[D]iscretion imports not the court's inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles." *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 770-71 (1976) (citation omitted).

III. Standard for Modification

While a court's equitable power to fashion a remedy is broad and its continuing duty to modify or vacate relief inheres to the prospective nature of the relief,[9] modification is subject to an exacting standard from which this circuit has not wavered. *See Blinder, Robinson*, 855 F.2d at 679; *Equal Employment Opportunity Comm'n v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *Securities and Exch. Comm'n v. Thermodynamics, Inc.*, 464 F.2d 457 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

This standard, first articulated in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), requires "[n]othing less than a clear showing of grievous wrong evoked by

[9] The Court stated in *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932), "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."

new and unforeseen conditions . . . to change what was decreed after years of litigation with the consent of all concerned."[10] The Court cautioned:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. *We are not at liberty to reverse under the guise of readjusting.* Life is never static and the passing of a decade has brought changes to the grocery business as it has to every other. *The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow.*

Swift, 286 U.S. at 119 (emphasis added).

Hence, to pass muster under this test, the party seeking relief from an injunctive decree "must demonstrate dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor." T. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101, 1110 (1986). While the *Swift* language may also support a modification when the original purposes of the injunction are not fulfilled,[11] the standard still constricts the district court's inquiry.

[10] Although *Swift* involved a consent decree, the Court asserted the same standards apply after litigation. Moreover, the Court applies no distinction to requested modifications of decrees sought by either plaintiffs or defendants. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

> Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Ref. Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969). Fed. R. Civ. P. 60(b) codifies this standard.

When the relief has been fashioned and the decree entered, "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate." 64 Tex. L. Rev. 1101, 1105. For this reason, the court's jurisdiction extends beyond the termination of the wrongdoing, *Battle v. Anderson*, 708 F.2d 1523, 1538 (10th Cir. 1983), because an injunction seeks to stabilize a factual setting with a judicial ordering and *maintain* that condition which the order sought to create. The condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing. *Securities and Exch. Comm'n. v. Jan-Dal Oil & Gas*,

[11] "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (government sought modification of injunction to achieve purposes of original decree). *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 602-03 (1973).

Inc., 433 F.2d 304 (10th Cir. 1970). To do otherwise is to return the beneficiary of injunctive relief to the proverbial first square. It is for this reason that *Swift* remains viable.[12]

Thus, compliance alone cannot become the basis for modifying or dissolving an injunction. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Jan-Dal Oil & Gas, Inc.*, 433 F.2d at 304.[13] Nor can a mere change of conditions alter the prospective ordering of relationships embodied by a permanent injunction. The party subject to the decree must establish by clear and convincing evidence that conditions which led to the original decree no longer exist, or the condition the order sought to alleviate, a constitutional violation, has been eradicated.[14] Until this showing is made, the decree stands.

Nevertheless, a permanent injunction empowered by a court's continuing jurisdiction does not presume that its underlying circumstances or the rights achieved remain static. "By its forward cast, an injunction contemplates change and must be sufficiently malleable to adapt the ordered relief to contemporary circumstances." *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1056 (5th Cir. 1986). Thus, while principles of res judicata may be applied to the factual finding of unitariness at the time the finding is made with the injunction in place, we have recognized that this past finding alone does not bar reconsideration of the decree. *Dowell*, 795 F.2d at 1519.

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[12] It is noteworthy that the original *Swift* decree, affirmed in 1905, *Swift & Co. v. United States*, 196 U.S. 375 (1905), was followed by a second decree in 1920 which was not dissolved until 1981.

[13] In *Jan-Dal Oil & Gas*, 433 F.2d at 306, we reversed the district court's dissolution of a permanent injunction upon finding defendant's proof established merely "short term compliance with the law." *Id.*

[14] Our case differs from *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437-38 (1976), which found modification appropriate because "no majority of any minority" provision in the 1974 injunction was "contrary to the intervening decision of this Court in *Swann*."

In contending there should be a different standard employed in school desegregation cases, the dissent miscasts our basic premise. We do not imply perpetual supervision of public schools by federal courts, nor do we suggest the Board is incapable of complying with constitutional mandates. We take the simple position that an injunctive order entered in a school desegregation case has the same attributes as any other injunctive order issued by a federal court, and that it is binding upon all parties until modified by the court which entered the order in the first instance. We add, as the trial court initially recognized, the injunctive order can be modified or dissolved only upon a finding of changed conditions. In this context, the intent of the defendants has little, if any, relevance.

IV. Purpose of Injunctive Relief

In 1972, having found "the Defendant School Board has totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own," *Dowell*, 338 F. Supp. at 1271, the district court held that "[p]laintiffs are entitled to a decree requiring the reasonably immediate conversion of the Oklahoma City Public Schools into a unitary school system." *Id.* at 1272 (citations omitted). The Board was ordered not to alter or deviate from the plan without "the prior approval and permission of the court," and the order was made binding on the Board, "its members, agents, servants, employees, present and future, and upon those persons in active concert or participation with them." *Id.* at 1273.

The decree embodied the constitutional mandate to eliminate "root and branch" racial discimination enforced through a dual school system. *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 437 (1968). The resulting terrain circumscribed by the injunction was later declared unitary upon the district court's finding certain components of unitariness to have been satisfied.[15] "[U]nitariness is less a quantifiable 'moment' in the history of a remedial plan than it is the general state of successful desegregation." *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987); *see also Brown v. Board of Educ. of Topeka*, (No. 87-1668).[16] While a declaration of unitariness addresses the goals of injunctive relief, it alone does not sweep the slate clean.

Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to issuance of that decree. *Dowell*, 795 F.2d at 1521; *contra United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784

[15] While the Supreme Court has defined neither the meaning of the term unitary nor the time and method of closing a school desegregation case, the Court has suggested that the elimination of "invidious racial distinctions" related to student assignment, transportation, support personnel, and extracurricular activities, and the school administration's concern for producing and maintaining schools of like quality, facilities, and staffs meet a threshold showing of unitariness. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971); *see also Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227-28 (5th Cir. 1983) ("Constructing a unitary school system does *not* require a racial balance in all of the schools. What is required is that every reasonable effort be made to eradicate segregation and its insidious residue." (citations omitted)). Professor Fiss has queried, "But what is a permissible basis for assigning students to schools under a 'unitary nonracial school system'? This seems to be the central riddle of the law of school desegregation." Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. Chi. L. Rev. 697, 700-01 (1971).

[16] The *Morgan* court defined unitary status as "a fully integrated, non-segregated system," 831 F.2d at 316, that is, complete desegregation "in *all* aspects of the . . . schools." *Id.* at 318.

F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).[17] Until that showing, "those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to the order, until it is modified or reversed." *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976). It is imperative that the rights of the party for whose benefit an injunction has been entered are affected by no one unless a court determines the injunction in current form is no longer necessary to achieve the court's original objective. It is also imperative that when considering whether to vacate or modify an injunctive decree, the district court not retry "the original premises of the judgment; instead, any modification must be confined and tailored to the change in circumstance that justifies the modification." *Lawrence County School Dist.*, 799 F.2d at 1056. Necessarily, however, in conducting a factual inquiry into the changed conditions pled, the court must reexamine whether the underlying substantive obligations are preserved. *See* B. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L. Rev. 789 (1988).[18]

[17] The dissenting opinion, like that in *Overton*, 834 F.2d at 1171, confuses a trial court's jurisdiction to enforce its mandatory orders with the concept of finality. We agree that a federal district court should not attempt an interminable supervision over the affairs of a school district. Recognizing the inherent power to enforce prior orders, however, is not inconsistent with the objective of curtailing active supervision. Once the school district has achieved unitariness, the court's need for active jurisdiction ceases. Its power to enforce its equitable remedy, however, is born when the remedy is fashioned and does not die until the remedy expires. By upholding this power, we are not holding, as the dissent seems to suggest, that a district court retain post-remedy authority over a school district for any reason other than to enforce, modify, or vacate its decree. Thus, the dissent's suggestion that we have added a new dimension to the law by "retaining jurisdiction" over this case fails to recognize we add nothing to the district court's jurisdiction that it did not already possess.

[18] Professor Landsberg correctly points out that this "core issue of the substantive obligations of formerly *de jure* school systems which have successfully desegregated" has been overlooked in the judicial haste to restore school governance to local authority. 48 La. L. Rev. 789, 815 (1988). *See also* P. Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728 (1986).

V. Burden of Proof

A.

Nevertheless, in this case, unilaterally and without prior approval from the district court, as required by the injunctive decree, the Board implemented the Plan. It is uncontested that the contents of the Plan are contrary to the explicit dictates of the injunction. As we previously noted, the Board's action creates a "special circumstance which permitted plaintiffs to return to court and test the presumptions premised in the declaration of unitariness." *Dowell*, 795 F.2d at 1522. We so instructed the district court.

The first presumption we address, then, is whether the Board's Plan *maintains* the unitary status of the District since the injunction remained in effect when the Board restored neighborhood schools for elementary student assignments.[19] This presumption flows from the Board's continuing affirmative duty to "accomplish desegregation," *Swann*, 402 U.S. at 42, to attain "maximum practicable desegregation," *Morgan v. McDonough*, 689 F.2d 265, 280 (1st Cir. 1982), and to protect the constitutional rights of the class protected by the equitable remedy. *Keyes v. School Dist. No. 1, Denver, Colo.*, 609 F. Supp. 1491, 1515 (D. Colo. 1985). The remedy "must survive beyond the procedural life of the litigation." *Dowell*, 795 F.2d at 1521.

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[19] The dissent states: "Here, despite the school district's continued unitary status, this court retains jurisdiction and now orders the school district to racially balance the elementary schools which most certainly will require busing." Dissent at p.2. We are compelled to point out that the question of continued unitariness of the District so readily assumed by the dissent was the key factual controversy in this case. Moreover, *both sides* recognized conditions had changed since the entry of the injunctive order, thus clearly suggesting the incongruity between those changed circumstances and the facts which convinced the trial court the District was unitary. Whether the District was unitary before circumstances changed is irrelevant to whether the decree should be amended or vacated. Indeed, whether the District remains unitary in light of changed circumstances is a wholly different question. Finally, our focus is upon the issue of desegregation. How that objective will be reached must be left first to the Board's judgment, and we will not engage in shibolethic speculation.

That thirty-two of the sixty-four elementary schools in Oklahoma City emerge from the Plan as one-race majority schools not only establishes a prima facie case that the decree has been violated and the presumption of unitariness challenged, but also satisfies plaintiffs' burden in reopening and shifts the burden to defendants to produce evidence of changed circumstances or oppressive hardship.

> [I]n a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition . . . The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, 402 U.S. at 26. The Board bears a "heavy burden" to show that its implementation of the Plan does not "serve to perpetuate or re-establish the dual school system." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (quoted in *Clark v. Board of Educ. of Little Rock School Dist.*, 705 F.2d 265, 271 (8th Cir. 1983)). This burden is not alleviated after a finding of unitariness when the decree remains in place but is focused on the *Swift* inquiry whether "anything has happened that will justify us now in changing a decree." 286 U.S. at 119.

The Board sought to prove that substantial demographic change in the District established new conditions that were unforeseen at the time the decree was instituted and which now produced "hardship so 'extreme and unexpected' as to make the decree oppressive." *Equal Employment Opportunity Comm'n v. Safeway*, 611 F.2d at 800 (quoting *Swift*, 286 U.S. at 119). While the record sets forth changed circumstances not unlike those contemplated by *Swann*, it fails to estab-

lish "the dangers the decree was meant to foreclose must almost have disappeared." *Humble Oil & Ref. Co.*, 405 F.2d at 813.

B.

In its factual findings, the district court relied on relocation statistics offered by defendants' experts, Drs. Clark and Welch. Although Dr. Clark's evidence indicated black families had relocated within and outside of the District,[20] he conceded that his examination focused only on seven inner-city tracts and not on additional predominantly black residential tracts to the north of the studied area. (R. II, 93-94). While Dr. Clark's study establishes there is a substantial decrease in black population in these particular tracts, it reveals the same decrease for *total* population.[21] Both on direct and cross-examination, Dr. Clark stated that the area encompassing the seven tracts underwent "land use transition," (R. II, 68) and that construction of interstate highways, I-40 and I-35, and developments in institutions, notably the hospital complex, had "dramatic impact" on population movement in some of the studied tracts.(R. II, 68).

Based on this testimony, the court concluded there was "a substantial amount of turnover in the black population residing in the east inner-city tracts." *Dowell*, 677 F. Supp. at 1507. This conclusion is also premised on metropolitan census data compiled from completion of a long census form. While the long census form asks the respondent whether he or she lived in the same house five years before, it does not determine whether the respondent moved out of the

[20] Dr. Clark produced relocation statistics for black families with kindergarten children, 1974-75 to 1977-78, and black families with children in three grade levels, 1982-83 to 1984-85. The results are visualized in Def. Exs. 7 and 8.

[21] The court's order reproduced only the figures for black population. Defendant Exhibit 5D, on which the court relied, also represented "total population" figures for the studied tracts.

District or merely down the street. The basis for the turnover[22] rate is thus incomplete, rendering the census form suspect.[23]

Using census figures, Dr. Clark calculated that the percentage of black population residing in these tracts in Oklahoma City between 1960 and 1980 decreased by 67.2%.[24] Despite his statement about external forces affecting population movement, Dr. Clark concluded that "private preference" was the chief motivating factor in determining where people chose to live.[25] (R. II, 113). Dr. Clark observed the "strong disinclination" of whites to move into predominantly black neighborhoods and their coincidental inclination to move out of neighborhoods that become 25 to 30% minority. (R. II, 105). He conceded that majority black areas would then be unlikely to change unless the black population moved elsewhere. (R. II, 106).

The district court thus observed, "Some blacks were choosing to live within the area and others were choosing to move away. (Tr. 71)." 677 F. Supp. at 1507.

The district court also relied on the testimony of Dr. Welch who presented statistical analyses of the racial composition of residential attendance zones in the District from 1972 to 1986 and then used these figures to project racial composition in 1995. Based on Dr. Welch's calculations, the court noted that "the exposure of blacks to non-blacks almost doubled." 677

[22] The district court noted that "turnover" refers to persons who did not live in the same house five years previously.

[23] In *Keyes v. School Dist. No. 1, Denver, Colo.*, 609 F. Supp. 1491, 1508 (D. Colo. 1985), the district court rejected evidence of demographic change based on the long census form because of its omission of key information and incomplete sampling.

[24] "In 1960, 81% of all blacks residing in the Oklahoma City metropolitan area lived within these tracts. In 1980, however, only 16.8% of the total black population in the metropolitan area lived in this area." 677 F. Supp. at 1507.

[25] Dr. Clark stated that his use of the term "preference" does not preclude the element of prejudice. (R. II, 113).

F. Supp. at 1508.[26] Embracing Welch's analysis which included a ranking of the 125 school districts he had studied, the court declared, "the Oklahoma City school district experienced the eighth largest reduction in the index of dissimilarity or, in other words, the eighth greatest improvement in integration, during the period from 1968 to 1982 (Def. Ex. 27; Tr. 130-31)." 677 F. Supp. at 1508.[27] The court noted that "[e]ven after implementing the K-4 neighborhood school plan, the degree of overall dissimilarity among the races attending school in Oklahoma City was less than that of Tulsa, Oklahoma, whose index was .557. (Def. Ex. 38)." 677 F. Supp. at 1508.[28] Similarly, the district court relied on a comparison of the District figures following implementation of the Plan with figures from other "unitary districts in the country."[29] Noting the change

[26] Dr. Welch utilizes the terms "dissimilarity index" and "exposure index" to express these ratios. The former represents the distribution of the races in an area, while the latter indicates how well a school system is integrated based on the same two-group comparison, whites and non-whites. He then postulates that a dissimilarity index of .00 signifies a maximally integrated population while an index of 1.0 represents a segregated population. The exposure index reverses the ratio with .00 representing the most segregated population and 1.0 the most integrated neighborhoods. Dr. Welch's study relied principally on the dissimilarity index. "We do not use the exposure index very intensively in the study." (R. II, 130).

[27] Dr. Welch stated on direct examination that the study of the dissimilarity index used in this comparison included 1968 to 1982 and did not show the dissimilarity in the District after implementation of the K-4 Plan in 1985. (R. II, 132). The inevitable conclusion, then, is that the achievement of integration in the District was the consequence of the adoption of the Finger Plan.

[28] Plaintiffs' objection to the admission of this comparison without any foundation was overruled on the ground it could show "some school boards are less attentive to the problem or more attentive to the problem than others." (R. III, 195-96). Nevertheless, the court utilized this comparison as substantive evidence of the impact of the Plan on the degree of "overall dissimilarity among the races." 677 F. Supp. at 1508.

[29] The court's analysis is based on Def. Ex. 39, a list of 117 school districts declared unitary according to a Justice Department press release. In response to Dr. Welch's statement that he had not verified the list (R. III, 280), the court agreed to take judicial notice of *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413-14 (11th Cir. 1985), which called the accuracy of part of the list into question.

in the dissimilarity index from .78 prior to implementation of the Finger Plan to .24 in 1984, the district court stated "the index rose *slightly* to .38" in 1985 with the reintroduction of neighborhood schools. 677 F. Supp. at 1509. Contrary to the district court's characterization, the rise in the index represents a 58% increase in the ratio of blacks to non-blacks. Despite this expansion of dissimilarity, the court concluded the "increased residential integration in Oklahoma City has resulted in a much lower level of dissimilarity today in the neighborhood elementary schools (.56) than existed in 1971 before the Finger Plan was implemented (.83). (Def. Ex. 44; Tr. 187)." 677 F. Supp. at 1509.

On the basis of Def. Ex. 20, two graphs plotting enrollment figures for the District for white, black, and non-black minority students, grades K-12, the court concluded "the student body is truly multicultural."[30] 677 F. Supp. at 1509. Nevertheless, the court acknowledged the Plan created "some schools," eleven, which are 90%+ black but observed "the plan created *no* schools which are 90% or more white." *Id.* at 1510. The Plan, however, created twenty-one schools that had less than 10% black student enrollment.

The district court does not address contrasting evidence in the record. Unmentioned by the court is plaintiffs' cross-examination of Dr. Welch which produced testimony directly controverting that of Dr. Clark[31] and undermined the method employed to create the figures the Board relied on to represent substantial demographic change and the oppressiveness of the decree. Noting that he used two different methods for calculating the 1974 to 1986 figures and the 1986

[30] In 1986, whites comprised 47%, blacks 40%, and non-black minorities 13% of the District's enrollment.

[31] For example, on the basis of his calculations, Dr. Welch projected the black population in the District for 1995. (Def. Ex. 11). The projection represented areas between 92.3% and 100% black, becoming somewhere between 89.6% to 93.2% black. Dr. Welch stated the projections suggest whites will move into the area. (R. III, 252-53).

to 1995 figures, Dr. Welch conceded: "And I really didn't want an inconsistent forecast. I thought someone would be cross-examining me. And so I designed the procedure to be completely internally consistent." (R. III, 244). His numbers, he stated, were "guesstimates." (R. III, 246).

In addition, the court does not reference the testimony of Dr. Yale Rabin, plaintiffs' expert in population distribution. Using U.S. Census data, Dr. Rabin compared and analysed the black population in the District between 1950 and 1980. According to these census tract figures, the black population expanded from one tract in which approximately 25% of the District black population resided, to sixteen tracts 75%+ black, including 60.8% of the District's black population. He explained that as the area expanded spatially from one tract in 1950 to six tracts in 1960, thirteen tracts in 1970, and sixteen tracts in 1980, each expansion included the original all-black tracts. (R. VII, 1125-31). Dr. Rabin controverted Dr. Clark's conclusion that the black population had dropped to 16.9% in 1980 in the six tracts. "[T]he area of concentration itself has changed, and it's misleading to refer, in each successive decade, to the same six tracts as the area of concentration." (R. VII, 1133). Dr. Rabin not only recognized the substantial population displacement caused by institutional and highway development but focused the effect of Def. Exs. 7 and 8, maps showing the numbers of black families and general direction of movement in and out of the District. For example, Dr. Rabin noted that while 46 families moved into white areas from the northeast quadrant from 1974 to 1978 (Def. Ex. 7), many thousands of blacks live in the subject tracts, thus putting the significance of the turnover numbers into perspective. (R. VII, 1157). In fact, the more predominant population shift, 148 families, was within the northeast quadrant.

Most importantly, Dr. John Finger, plaintiffs' expert, underscored that the Board's statisticians had "changed the rules." (R. VIII, 1207). He explained,

> There will be no schools that have less than ten percent minority, but there will be schools that have less than ten percent black. How you label these as segregated or not is what the words mean, and segregated has always been a difficult word.

(R. VIII, 1208).

Permeating the testimony on demographic change were sharply contrasting views on the impact of busing on children of "tender age." 677 F. Supp. at 1526. Numerous lay witnesses and District personnel testifying on behalf of the Board generally stated that busing young children had an adverse, emotional impact on the child.[32] Defendants' expert witness, Dr. Herbert Walberg, a research professor at the University of Illinois, offered a study he completed showing that black children who were transported to school tested lower than black children who did not ride a school bus. Plaintiffs' witness, Dr. Robert Crain, who was qualified an expert on school desegregation, stated that Walberg's study was "absolutely indefensible" because it omitted critical covariant factors like socioeconomic status in the analysis. (R. VII, 1008). Dr. Crain stated that in light of the fact that half of all public school students ride a school bus and that only 5% of those children are bused for desegregation purposes, the evidence of the harmful effects of trans-

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[32] For example, counsel for the Board asked plaintiffs' expert, Dr. Foster, if busing young children would be potentially more difficult because "they're not fully developed." (R. VIII, 1367). The court asked one witness if, in her opinion, K-4 children are too young to be bused. (R. III, 338). Mrs. Clara Luper, a teacher at John Marshall High School, stated that her daughter was "excited about riding the bus." (R. IX, 1403). Testimony on busing distances tended to be based on estimates of time and mileage, not actual routing distance. *See*, e.g., R. V, 705.

portation on student achievement and emotional development is suspect. The district court did not reference plaintiffs' evidence on this issue.

C.

Based on the divergent testimony on demographic change, the court concluded the Board had not taken action to cause or contribute to presently existing residential segregation but "[i]f anything, the action of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have [sic] fostered the neighborhood integration which has occurred in Oklahoma City." 677 F. Supp. at 1512. Previously, in summarizing the relocation statistics, the court observed, "These relocation studies reveal the compulsory busing of black children to a certain area does not have any appreciable affect [sic] on where their parents choose to relocate. (Tr. 76-77)." 677 F. Supp. at 1508.

That demographic change of some degree occurred within the District after the Finger Plan was instituted is apparent. As *Swann* observed, "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so." 402 U.S. at 31. Nevertheless, we are reluctant to hitch the preservation of hard-won constitutional rights to numbers alone. "Unitary status is not simply a mathematical construction." *Morgan*, 831 F.2d at 321. As the district court observed in *Keyes v. School Dist. No. 1, Denver, Colo.*, 609 F. Supp. at 1516, "The expert testimony in this case concerning the use of racial balance and racial contact indices, and the differing conclusions reached by the experts called by the respective parties, demonstrate once again the facility with which numerical data may be manipulated and discriminatory policies may be masked." In Oklahoma City, the sum total of all of the numbers immutably underscores the emergence of eleven all-black elementary schools

and twenty-one 90%+ white and non-black minority schools, roughly half of the District's elementary schools, with the reinstitution of neighborhood black schools for the elementary grades. In fact, when the actual numbers of children attending District elementary school are run, the result is even more dramatic. Of the approximately 6,464 black students[33] attending the District's elementary schools K-4, 2,990 or 46.2% of all black elementary children in the District attend the eleven 90%+ black elementary schools.[34]

D.

Similarly, we are unable to conclude that these same numerical calculations support a finding that the Finger Plan became a hardship "extreme and unexpected," *Humble Oil & Ref. Co.*, 405 F.2d at 813, because of the unintended impact of the stand-alone schools. This hardship was projected to arise if a school became stand-alone, necessitating busing black students, who had been bused into that school, even greater distances to attend an integrated school. With more students attending naturally integrated K-5 schools, the 5th-year centers in the black community would then have to close.

As viewed by the district court, the creation of Bodine Elementary School in southeast Oklahoma City as a K-5 stand-alone caused the Board to focus on the "perceived inequities" of the stand-alone feature. 677 F. Supp. at 1513. According to the minutes of the Board meeting which addressed the question of mak-

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[33] This total number includes the Star-Spencer area which was already treated differently under the Finger Plan because of its geographic separation from the District.

[34] These calculations are based on plaintiffs' Exhibit No. 26, Membership by School, Race and Grade, K-4 Elementary Schools. The District's data processing department generated the enrollment figures.

ing Bodine a K-5 rather than a K-4 stand-alone,[35] Board members voiced several concerns over the process of deciding which schools qualified and became stand-alone. (Def. Ex. 76). Dr. Clyde Muse, a black Board member, objected that the creation of Bodine stifled growth in the northeast quadrant and was yet another example of "a concerted effort to see to it that not only will the black community or the northeast quadrant not integrate, there also seems to be a concerted effort on somebody's part to see that it always remains impoverished." (Def. Ex. 76 at 349). Dr. Muse lamented the inevitable closing of schools in the northeast quadrant and urged the District undertake a study to determine what changes had occurred that could result in a more equitable plan for the District rather than the apparent piecemeal approach. *Id.* Another Board member, Ms. Jean Brody, urged the District to undertake a comprehensive study to avoid what she perceived as random planning that resulted in Bodine's becoming a K-5 stand-alone, but postponed Rockwood Elementary School's becoming stand-alone although it fully qualified and had the capacity to become a K-5 school.[36]

In voting to make Bodine a K-5 stand-alone, the Board rejected the advice of Dr. Paul Heath, a board member, that the K-5 concept was educationally unsound and would ultimately adversely impact the entire District. Of concern to participants at the meeting was the fact that in going to K-5 status, Bodine fifth graders would give up the opportunity to participate

[35] Prior to Bodine's designation as a K-5 stand-alone, only two other K-5 stand-alones operated in the District. Horace Mann Elementary School became a K-5 facility when the Finger Plan was implemented. Arcadia was considered a K-5 stand-alone "based on different criteria" and was treated differently because of its isolated location. (Def. Ex. 76).

[36] Before making Bodine stand-alone, the Board had agreed to add four classrooms because of capacity problems at the school. Until the addition was finished, however, 14 portable structures were necessary to solve the overcrowding. Even with the new addition, the Board estimated that 5 portables would still be needed. (Def. Ex. 76).

in special programs like strings and visual arts offered at the 5th-grade centers. (Def. Ex. 76). On the positive side, however, student reassignments necessitated by making Bodine stand-alone were not expected to impact the existing 5th-grade centers. (Def. Ex. 76).

Similarly, the trial testimony on the hardship of stand-alone schools echoed some of those concerns and underlined that the Board's planning was based on theoretical conjecture, speculative forecasting, and discretionary decision making. At the outset, Dr. Welch noted that of the eleven stand-alone schools open in 1972, only three retained this status in the District in 1984.[37] (R. III, 289). The projected number of stand-alones was tied to Dr. Welch's 1995 District calculations. A senior researcher for the District, who monitored student assignments and helped prepare projections on stand-alones, stated that although ten schools were eligible for stand-alone status, only three were then stand-alone. He stated that in order to create a stand-alone, the eligible school had to have the capacity to absorb the increased number of students. (R. IV, 495-96); *see also* Def. Ex. 69. Internal Board memoranda also addressed the possibility of creating additional stand-alones by altering attendance boundaries, exploring reassignment options,[38] and opting for either K-4 or K-5 stand-alones. (R. IV, 498). Dr. Finger stated that the original plan anticipated making as many schools stand-alone as qualified even if some busing distances increased. "But, . . . these things get to be political." (R. VIII, 1201). The 5th-grade centers, he stated, were considered temporary and were designed to be incorporated into the middle schools.

[37] Overcrowding (Edgemere) and loss of racial balance caused eight schools to lose their stand-alone status. However, three K-4 stand-alones, Harrison, Edgemere, and Western Village, remained stand-alone. (Def. Ex. 76).

[38] Student assignments were constrained by Policy JC which prohibited reassignment of students who had been reassigned within the prior three years. (Def. Ex. 70).

The stand-alone feature, thus, emerged from the evidence as a matter of speculation tied to capacity problems, budget constraints, and local politics. Nevertheless, it was the cornerstone upon which advocates of the need to modify or dissolve the Finger Plan built their claim of hardship.

VI. Impact of Plan on Modification

A.

We are satisfied the evidence reveals that because of population shifts in the District, it was necessary to modify the Finger Plan. It is within the court's equitable power to modify the Finger Plan to mirror these changed circumstances, to retain the unitariness of the District, and reflect the Board's continuing duty under the decree. Just as the court can tailor the relief to modification, so too can it dissolve the injunction upon finding "that what it has been doing has been turned through changing circumstances into an instrument of wrong." *Swift*, 286 U.S. at 114-15. Unfortunately, the district court perceived this duty entirely in terms of the Board's alleged discriminatory intent in adopting the Plan. This perception overlooks the essential point. Given the changes that emerge from all of the evidence presented, the court must determine whether the Plan ameliorates those conditions. Dissolution is appropriate only if the evidence unmistakably reveals the Plan encompasses the changed circumstances and maintains the continuing prospective effect of the decree.

Again, to undertake this analysis, the court must direct its attention to "the question of the withdrawal or modification of injunctive relief granted in the past . . . where the Cardozo [*Swift*] precepts are the operating guidelines." *Humble Oil & Ref. Co.*, 405 F.2d at 814. Thus, while the Board's motive may be one circumstance in evaluating the effect of the Plan, it is only an element affecting the ultimate decision. An unimpeachable motive cannot obscure the essential question, does the Plan relieve the effects of changed circumstances and potential hardship? Only a positive response will merit dissolution.

B.

The issue then becomes whether the Board's action in response to the changed conditions has the effect of making the District "*un*-unitary" by reviving the effects of past discrimination. The new Plan must be judged in light of the old plan to assure it mirrors actual changes in the District without so radically departing from the original decree that the rights secured by that decree are vitiated.

Swann guides our review in this inquiry by focusing our attention on the Board's continuing duty to remedy the effects of past discrimination until "it is clear that state-imposed segregation has been completely removed." 402 U.S. at 13; *see also Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979).[39] The inquiry into whether the Plan maintains unitariness in student assignments may concretely be directed to evaluating (1) the number of racially identifiable schools; (2) the good faith of school officials in the desegregation effort and running the schools; and (3) "whether maximum practicable desegregation of student bodies at the various schools has been attained." *Morgan*, 831 F.2d at 319. *See also Brown v. Board of Educ. of Topeka*, (No. 87-1668); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983) ("[T]he decision that public officials have satisfied their responsibility to eradicate segregation and its vestiges must be based on conditions in the district, the accomplishments to date, and the feasibility of further

[39] *Swann* envisioned stability "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." 402 U.S. at 32.

measures.").[40] No one factor is dispositive of the determination that unitariness is preserved. However, once dismantled, the dual school system should remain dismantled.

Thus, we are troubled because the evidence indicates the Board's implementation of a "racially neutral" neighborhood student assignment plan has the effect of reviving those conditions that necessitated a remedy in the first instance. Under these circumstances the expedient of finding unitariness does not erase the record or represent that substantial change in the law or facts to warrant overlooking the effect of the Board's actions.[41]

C.

The district court was satisfied the Plan was adopted to remedy the increased busing burdens on young black pupils, avoid closing 5th-year centers in the northeast quadrant, and eliminate the inequities of stand-alone schools. Despite the emergence of one-race elementary schools, the court found the Plan did not disturb the District's unitariness. The district court concluded that unless the Plan was adopted with discriminatory intent, a neighborhood school plan that has the effect of creating one-race schools is not constitutionally infirm.

To reach this conclusion, the court examined the remaining components of the Plan. While school faculties were not in perfect racial balance, particularly in the 90%+ black elementary schools, the court found that negotiated agreements with the teachers' union and teacher preference and seniority accounted for the imbalance and not Board policy.

The court did not address plaintiff's exhibits 48, 50, 52, and 54. The exhibits compare elementary school enrollment with the racial composition of faculty from 1972 to 1986-87 and reflect the growing parity of imbalance between faculty and students. By 1986-87, the 90%+ black elementary schools are staffed by predominantly black teachers.[42] Although the executive director of personnel testified that especially after 1985,[43] teacher assignments would comply with the District's affirmative action goal of 36.9% with a 10% variance factor, the numbers belie the aspiration.

Nevertheless, the court was satisfied that recent Board action would "bring[] elementary faculties into racial balance in 1987-88," 677 F. Supp. at 1519, based on the statement of the District's affirmative action program planner. However, the record fails to support this conclusion with any specific evidence of change to overcome plaintiffs' documented countertrend.

The district court believed that other factors in the equation maintained the District's unitariness and offset the racial imbalance in the elementary schools.

[42] For example, in 1986-87, at Edwards Elementary School, which is 99.5% black, the faculty is 70% black. At Rancho Village Elementary School, which has a 10.6% black student population, there are no black teachers. (Pl. Ex. 54). In 1972, the Edwards' faculty was 15% black; Rancho Village's faculty was 23% black. (Pl. Ex. 48).

[43] According to the witness, after the Plan was implemented, teachers with seniority were permitted to choose their teaching assignments. As a result of individual preference, many of the faculties became imbalanced. (R. IV, 555). In fact, prior to the Plan's implementation, Board member, Ms. Jean Brody, voiced her concern that the current teacher agreement was negotiated "without the knowledge that schools might be changed around." Def. Ex. 2.

Of prime importance was the majority-to-minority transfer option which represented to the court that "parents in Oklahoma City today have a choice. No pupil of a racial minority is excluded from any school in Oklahoma City on account of race." 677 F. Supp. at 1523. The record does not support this assertion. In fact, there is little evidence to determine the effectiveness and utilization of the transfer option. Dr. Belinda Biscoe, an administrator in the department of support programs, testified that letters were sent after the Plan was implemented informing parents of the M & M option, but no follow-up was done. Dr. Biscoe expressed the concern, apparently voiced by the District superintendent, that parents needed more information about the option. (R. III, 327). Asked if the Board had studied the program to determine who was exercising the transfer option, Dr. Biscoe answered that she did not believe the numbers had been analysed. (R. III, 327). Dr. Betty Mason, the assistant superintendent of high schools, agreed that the M & M policy could not serve to desegregate the schools in the northeast quadrant (R. V, 609) and was limited by the capacity of the receiving school. Although Dr. Finger acknowledged the M & M option might work if parents understood the alternative and were willing to exercise it, he observed that often those children who most need desegregated schools would be "the least likely to take that option." (R. VIII, 1196). Another defense witness believed the transfer option was available for "convenience." (R. VI, 837). There is simply no other evidence in the record to support the court's conclusion that parents understand the availability of the option and freely exercise it. Indeed, the court's analysis of the figures indicating 332 parents exercised the option the first year of the Plan and 181 the following year suggests otherwise. 677 F. Supp. at 1523.

Likewise, the effect of the Board's desire to maintain the District's unitariness by implementing programs like Effective Schools, Student Interaction,

Adopt-A-School, and the position of Equity Officer is equally undocumented. The District's Effective Schools program incorporates educational aspirations and attempts to translate those values into enhanced student achievement. (R. VI, 918-19). Although the court hailed a 13% decrease in the gap between black and white achievement test results in the District as evidence that the Effective Schools program was working, the test comparisons are flawed. The group of students studied one year is not the same studied the next year. (R. V, 744); *see* Def. Ex. 185. While there appeared to be some gain in achievement at eight of the 90%+ elementary schools as measured against the national average, scores at two 90%+ schools dropped. (R. VI, 942). More significantly, the meaning of the gain was not clear.[44] Additional testimony established that the Effective Schools program is geared to the upper grades (R. VII, 1004-05) and tied to budgetary constraints experienced by the District. (R. VI, 881). While the testimony was consistent that the concepts of "Effective Schools" and desegregated schools are not mutually exclusive, (R. V, 693) Board witnesses suggested that increased expenditures for busing would necessarily cut into the Effective School's budget. (R. VI, 944). Most importantly, there is no evidence of specific educational programs designed for those racially identifiable elementary schools to counteract the effect of concentrating low achievement in these schools.

The Board designed the Student Interaction Plan to pair schools 90%+ black with schools that do not have significant racial minority populations. (R. IV,

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[44] Dr. Finger observed that gain is an elusive concept, noting that "how much you can gain depends upon — on where you start . . . . It's easier to gain at the lower level — lower part of the scale than it is the higher part because the items are easier." (R. VIII, 1191). Dr. Carolyn Hughes, the assistant superintendent for curriculum and program development, stated that the District had undertaken to study the achievement gap using a method she called "the disaggregation of test data" which would look at "the disproportionality in achievement by race and socioeconomic level and gender." (R. V, 691).

394-95). Teachers were encouraged to bring students together two to four times a year and "to allow children to write letters to each other; to send video cassettes of themselves . . . to have the children read the same literature." (R. IV, 395). Although the program was discretionary with each classroom teacher, the Board hoped that perhaps nine to twelve hours a year would be devoted to the Interaction plan. (R. IV, 407). In contrast, plaintiffs' witness, Dr. Crain, rejected the value of student interaction based on exchanges of letters and infrequent visits to a paired school.[45] Meaningful interaction, he suggested, took place on a school athletic team or in a boy scout troop.

When the Plan was adopted, an Equity Committee chaired by an Equity Officer[46] was established to oversee the District and assure that facilities and equipment were relatively equal throughout the District. While the Board could be responsive to small dollar equipment adjustments (R. VI, 840) or building maintenance problems (R. VI, 834) recommended by the committee, its ability to effect a "major facility repair" or reduce overcrowding, for example, at a predominantly black 5th-year center, was constrained by funding reductions in the District and the consequent need to seek a bond election. (R. III, 370-72).

Similarly, the Adopt-A-School program, "a partnership between the public sector and the private sector," (R. V, 716) to provide resources, speakers,

[45] Pressed on cross-examination to explain why he didn't believe social interaction outside of school was beneficial, Dr. Crain was asked if he thought taking black children to a shopping mall to see white children or going to a movie theatre, "rubbing elbows at the candy counter, wasn't beneficial." Defense counsel then suggested that such contacts might be beneficial to blacks to "allow them to become socially acceptable when they . . . get out of school." (R. VII, 1093).

[46] The Equity Officer, who reported to the superintendent, was "responsible for monitoring the implementation of the District's student assignment plan" and making "recommendations that will maintain equity of educational opportunity to all students in all schools." Def. Ex. 3.

tutors, and money to community schools, does not counteract the imbalance created by the reinstitution of neighborhood schools. Like the considerable testimony about the increased participation of District parents in school PTA-PTO groups,[47] this evidence does not substitute for the constitutional mandate to maintain a unitary school system. In other words, while each program is laudable in principle and addresses a particular educational or community value, the program does not ameliorate the condition created by the Plan, the emergence of thirty-two effectively one-race schools.

D.

Although the court accepted the statements of school personnel and community members who "unequivocally testified that in their opinion the Board's K-4 neighborhood school plan was not discriminatory and did not result in the recreation of a dual school system," 677 F. Supp. at 1519, the quest for discriminatory intent is not so straightforward.[48] Indeed, the

[47] While the evidence established a substantial increase in parent participation in PTA-PTO, there was conflicting evidence on whether the District itself increased its commitment to generating parent involvement in the schools when neighborhood schools were reinstituted; how and what records were maintained to document parent participation prior to 1985; and what factors contributed to lack of parent participation — negative attitudes toward the schools, economics, etc. We are troubled by the nature of some of the evidence on which the court relied. For example, when asked about the decline in parental involvement in the schools prior to the 1970's and early 1980's, Dr. Betty Mason, the assistant superintendent of high schools, responded, "Again I have to give you the benefit of the discussions I have had with persons in the district as well as some of the readings that I have done . . . " (R. V, 610). When plaintiffs' objected to the testimony about to be elicited, the court overruled the objection on the ground that the statements were not hearsay but "important evidence for both sides." (R. V, 610-11).

[48] The court was generous in its praise, viewing it as "significant that the Board has elected to employ intelligent and competent black individuals in upper-echelon central office administrative positions." 677 F. Supp. at 1519. School facilities "are not discriminatory . . . [s]ince most of the predominately black schools today served as 5th-year

court asked various witnesses, lay and expert, if they believed the Plan was adopted with discriminatory intent.[49] One witness was asked if he believed the court should continue its supervision of the District. (R. VI, 953). Thus assured, the court concluded the Plan retained the District's unitariness and, in fact, enhanced it by fostering a greater degree of parental and community involvement in the schools. In light of this conclusion, the court wholly rejected plaintiffs' assertion that the Plan's incorporation of the same attendance zones used prior to the Finger Plan was evidence of the Board's discriminatory intent. Citing

centers under the Finger Plan . . . and expenditures made by the Board for the students in the predominately black elementary schools is [sic] greater than that made in the elementary schools with a black population of less than 10%." *Id.* at 1519.

[49] Plaintiffs' counsel objected to the court's questions. (*See, e.g.*, R. IV, 530; R.V, 619, 681, 695; R. VI, 860.) After one exchange between the court and Mrs. Betty Jo Hill, president of the Board, plaintiffs' counsel interjected his concern over the court's asking the witness if the schools were being operated as a unitary system and if the Plan altered the unitariness.

> The Court: Well, this is a question that the court's got to answer.
>
> Counsel: I certainly agree with you, and I think that it a question for the court to answer. It's a question of law. It's one of the questions that the Tenth Circuit has indicated that the court must respond to. And I don't think —
>
> The Court: How could I respond to it unless I know what the evidence shows?
>
> Counsel: Well, with all due respect, I don't believe that it's an appropriate legal question to ask the opinion of a lay witness, and particularly a school board member, about.
>
> The Court: Well, she's had eleven years of the school board activities, and that should almost — in my opinion does make her somewhat of an expert. (R. IV, 530).

The question, and those of the same nature repeatedly asked by the trial court, invited incompetent evidence. None of the witnesses was qualified to express either his opinion regarding the intent of the Board or whether the District was unitary. The question of intent is one for the trier of fact to decide from circumstantial evidence. The issue of unitariness is a matter which only the court can decide. To say that answers given to these questions provided proper foundational evidence for the trial court's findings ignores Fed. R. Evid. 701 and suggests surmise will satisfy a party's burden of proof.

Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977), the court responded that *"discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure upon one race."* In so concluding, the court narrowed its focus and overlooked the broader inquiry mandated by *Swann*.

Indeed, discriminatory intent cannot be ascertained by eliciting opinion testimony from witnesses, often out of context[50] and accumulating those responses as substantive evidence of the motive for the Plan. "Ordinarily, only circumstantial evidence is available to establish segregative intent." *Diaz v. San Jose Unified School Dist.*, 733 F.2d 660, 662 (9th Cir. 1984). In *Keyes v. School Dist. No. 1, Denver, Colo.*, 670 F. Supp. 1513 (D. Colo. 1987), the court stated:

> [S]ome discriminatory intent must be shown to prove a violation of the constitutional requirement that educational opportunity must be equally available. That intent is not, however, measured by the good faith and well meaning of individual Board members or of the persons who carry out the policies and programs directed by the Board. The intent is an institutional intent which can be proved only by circumstantial evidence.

Id. at 1516.

We also agree that neither "the foreseeability of segregative consequences" alone nor the emergence

[50] Defense counsel asked plaintiffs' expert, Dr. Mary Lee Taylor, if the Plan was adopted with discriminatory intent. The question followed her extensive direct testimony on the impact of institutional racism over time and the effect of the Finger Plan's unlinking many of those discriminatory patterns. Defense counsel then asked, "Based upon your educational background and your experience and your review of the facts in this case, *you don't feel* that the Oklahoma City Board of Education adopted this neighborhood plan with the intent to discriminate against blacks, *do you?*" (Emphasis added.) Dr. Taylor responded, "I have no evidence of that at all. I did not mean to suggest it." (R. VIII, 1236). Although the question is a non sequitur, the court cited her response to support its conclusion there was no discriminatory intent.

of one-race schools alone establishes a prima facie case of purposeful racial discrimination. *Dayton Bd. of Educ.*, 443 U.S. at 536, n.9. We must look at other circumstantial evidence, "the historical background and specific sequence of events leading up to the Board's actions maintaining or exacerbating ethnic imbalance in the district schools." *Diaz*, 773 F.2d at 663 (citation omitted).

Swann directs "an assignment plan is not acceptable simply because it appears to be neutral." 402 U.S. at 28. The Court stated:

> [S]uch [neutral] plans *may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation.* When school authorities present a district court with a "*loaded game board,*" affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

Id. (emphasis added). Within the context of the finding of unitariness, the Plan must be judged by its effectiveness in maintaining unitary status. *Davis v. Board of School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971). Thus, under *Swann*, we must total all of the evidence to decide if the district court correctly found the Plan maintained unitariness in student assignments.[51]

[51] In our analysis, we have declined to mire the legal issues with extensive examination of the conflicting evidence on the question of the effect of integration on student achievement. The dissent wades into this area, citing the testimony of Dr. Sampson, the Board's rebuttal witness, who had compared the achievement of blacks at six all-black parochial schools in the Chicago area to that of black students at Chicago public high schools. Based on this study, Dr. Sampson was asked if black students must be in a classroom with white students to learn effectively. He responded that an "effective schools program" and a dedication to education encompassed by positive socioeconomic conditions assured black student achievement. When asked on cross-examination if intentional segregation of the public schools is harmful, Dr. Sampson responded that it didn't have to be and certainly wasn't for those blacks going to the parochial schools he studied in Chicago. Who could disagree when we compare a self-selected private parochial school setting to a large urban public school. The court, however, used this evidence, comparing the 65% dropout rate of Chicago public high schools to the 80-90% rate of these parochial students who then attend college, to conclude "the racial composition of a school has absolutely no effect on the academic achievement of its students." 677 F. Supp. at 1524. Although we remain uncertain what this testimony was intended to rebut in the first instance, we are certain it cannot represent evidence of the District's commitment to maintain a unitary system.

It is on this basis that we conclude the district court clearly erred in its findings of fact and consequent legal determinations. While we recognize the dedicated care and tireless, patient effort with which the court has managed and overseen this case, we cannot abandon our obligation to review all of the evidence. Thus, although there is evidence to facially support the district court's findings, *on the entire evidence* we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Because the court failed to address or distinguish plaintiffs' contrary evidence, and because the court cast the evidence on which it relied in a form to provide an answer to the single question of discriminatory intent, we are convinced that the basis on which the court fashioned dissolution of the injunction was flawed.

VII. Relief

Thus, we must focus not on whether the Plan is nondiscriminatory but whether it solves the problems created by the changed conditions in the District. We are certain it does not. While there is evidence of demographic change, that evidence does not support a return to the neighborhood schools in the elementary grades because the same neighborhoods remain predominantly white and predominantly black. Moreover, the Plan restores the effects of *past* discriminatory

intent remedied by the decree by recreating racially identifiable elementary schools, overlooking school capacity problems, and failing to address faculty imbalance. Addressing these shortcomings does not overburden *Swann*'s remedial baggage.[52]

We are mindful that *Swann* contemplates actions which are systemwide in effect,[53] and the Plan affects only the elementary schools, leaving the Finger Plan in place for the middle and high schools. Nevertheless, we are convinced that the impact of the Plan on the District as a whole is greater than the sum of each of these parts.[54] As Judge Wisdom noted, "Infection at one school infects all schools. To take the most simple example, in a two school system, all blacks at one school means all or almost all whites at the other." *United States v. Texas Educ. Agency*, 467 F.2d 848, 888 (5th Cir. 1972) (quoted in *Keyes*, 413 U.S. at 201). Indeed, "[t]he effect of a racially discriminatory practice is pervasive. That effect is not eradicated by merely erasing the original cause." *Lawrence County School Dist.*, 799 F.2d at 1044.

The focus of our concern remains on the Board's duty. "Part of the affirmative duty imposed by our cases . . . is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 538 (1979). Despite its cosmetic trappings, the Plan is such an impediment. While the

[52] "One vehicle can carry only a limited amount of baggage." *Swann*, 402 U.S. at 22. In *Brown v. Topeka*, slip op. at 70, we suggested the Board of Education had not "exhausted the repertoire available for desegregating schools." This repertoire remains available to the Board as well.

[53] "The constitutional command to desegregate schools does not mean that every school in every community must always reflect that racial composition of the school system as a whole." *Swann*, 402 U.S. at 24.

[54] Former Board president, Mrs. Susan Hermes, conceded that there are no guarantees that student reassignments would not occur for grades 5-12 in the future because of inevitable changes in the Board's membership. (R. III, 361).

Board's concerns are not without foundation, they do not translate into the maintenance of a unitary system. "And, it is the responsibility of boards of education and the district courts to prevent the reestablishment of such school systems." *Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135, 1143 (5th Cir. 1982).

We are also satisfied based on our review of the record that modification of the Finger Plan is achievable without extreme disruption or burdensome expense. No geographical barriers have created the racial imbalance in the elementary schools. *Morgan v. Nucci*, 831 F.2d at 313 (unique geographic isolation caused by Boston Harbor justified single one-race middle school).[55] Nor was the evidence of white flight sufficient to justify the Plan.[56] *See Lee v. Anniston City School Sys.*, 737 F.2d 952, 957, n.3 (11th Cir. 1984) (plans designed to mitigate white flight are permissible provided desegregation effort not frustrated); *Liddell v. Missouri*, 731 F.2d 1294, 1313-14 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984) (fear of white flight is no excuse to avoid desegregation).

We do not ask that "each school be a statistical image of the [District]." *Lawrence County School Dist.*, 799 F.2d at 1047. Nor do we suggest annual assignment alterations to mirror the ever-changing demographic makeup of this urban setting. However, on the basis of the record, it is clear that other measures that are feasible remain available to the Board " 'to improve

[55] The Finger Plan already accommodated a geographically isolated area in its treatment of the Star-Spencer area.

[56] In *Riddick*, 784 F.2d at 521, the Fourth Circuit affirmed the district court's finding the reinstitution of a neighborhood school system retained the district's unitariness despite the creation of one-race schools. The court, recognizing that white flight alone cannot justify the failure to dismantle a dual school system, found the "school board legitimately considered the presence of 'white flight' in pursuit of a voluntary plan to stabilize school integration in Norfolk." *Id.* at 540. In a recent article, Professor Landsberg notes that "the early predictions of white flight in Norfolk did not materialize," citing an *American Lawyer* study that found that "white flight early in the desegregation process does not necessarily provide an accurate prediction of later behavior patterns." 48 La. L. Rev. at 830, n.192.

the fit between a decade of demographic changes . . . and the terms of student access to educational opportunities.' " *Morgan*, 831 F.2d at 318 (quoting district court order, *Morgan v. Nucci*, 620 F. Supp. 214, 220 (D. Mass. 1985)).

Our remand remains within the framework of the injunctive relief plaintiffs achieved. "Inasmuch as an injunctive decree is drafted in light of what the court believes will be the future course of events, a court must continually be willing to redraft the order at the request of *the party* who obtained equitable relief in order to insure that the decree accomplishes its intended result." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 600 (1973) (emphasis added). Remand is not predicated on the perpetual supervision of the district court but preserves the Board's duty "to achieve the greatest possible degree of actual desegregation." *Swann*, 402 U.S. at 26.[57]

> It is well to remember that the course we are running is a long one and the goal sought in the end — so often overlooked — is the best possible educational opportunity for all children. Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation.

Keyes, 413 U.S. at 253 (Powell, J. concurring in part, dissenting in part). Consistent with this goal, and with deliberate speed, the district court, on remand shall:

1. Take evidence of plaintiffs' and defendants' alternatives to maintain racially balanced elementary schools within the framework of the changed circumstances that have occurred in the District;

[57] This duty is clearly distinguishable from defendants' perception of plaintiffs' position as "nothing more than a plea to continue the busing of Oklahoma City's young students in perpetuity." We do not share that perception. By this remand we do not propose, as stated by the dissent at p.25, that amendment of desegregation decrees is only for plaintiffs. That suggestion ignores the plain import of all for which this opinion stands and is unwarranted by anything we have stated.

2. Modify the Finger Plan to accommodate the changed circumstances;

3. In modifying the Finger Plan, assure that faculties achieve racial balance under the District's Affirmative Action Plan;

4. In a manner workable to the parties and the court, retain jurisdiction for a reasonable period of time to oversee the implementation and maintenance of these assignments.

The judgment of the district court is thus VACATED[58] and the case REMANDED for further proceedings to modify the 1972 decree consistent with this opinion.

[58] Because we have vacated the judgment, the Board is no longer a prevailing party entitled to costs and attorney fees.

No. 88-1067, Robert L. Dowell and Vivian C. Dowell et al. v. The Board of Education of the Oklahoma City Public Schools, Independent District No. 89, Oklahoma City, Oklahoma, a Public Body Corporate; et al.

BALDOCK, Circuit Judge, dissenting.

It is ironic that the capstone of this court's opinion is a quote from Justice Powell,[1] concerning the importance of securing quality education free from "protracted and debilitating battles over court-ordered

[1] Surely Justice Powell would not have embraced this court's failure to terminate jurisdiction when a system has achieved and maintained unitary status. His eloquent dissents in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 478 (1979) (Powell, J., dissenting), and *Dayton Bd. of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526, 542 (Powell, J., dissenting), began with the observation that 25 years after *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954), "the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country." *Columbus*, 443 U.S. at 480 (Powell, J., dissenting). When read against a backdrop of a unitary school system, Justice Powell's concern for federalism, parental and community support of education, student retention and effective public schools are strong arguments against coercive federal authority in the absence of purposeful racial discrimination. *See id.* at 485-89.

In dissenting from the dismissal of certiorari petitions, Justice Powell emphasized the importance of "identify[ing] the link between the constitutional violation and the desegregation remedy," and recognized that "[i]n large cities, the principal cause of segregation in the schools is residential segregation, which results largely from demographic and economic conditions over which school authorities have no control." *Estes v. Metro. Branches of the Dallas NAACP*, 444 U.S. 437, 445 (Powell, J., dissenting from dismissal of petitions for certiorari); *see also id.* at 447; *Columbus*, 443 U.S. at 480-81 (Powell, J., dissenting). Moreover, Justice Powell commented upon the misuse, by lower federal courts, of the *remedial* language in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971), that "the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation." *Estes*, 444 U.S. at 446 n. 13. This court precedes its quote by Justice Powell with that very language from *Swann*. *See* Court's Opinion at 52-53.

Justice Powell adhered to the well-supported position that the constitutional violation by the school board determines the scope of the applicable remedy. *Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923, 924-27 (1980) (Rehnquist J. (joined by Powell, J. & Stewart J.), dissenting from denial of certiorari); *Cleveland Bd. of Educ. v. Reed*, 445 U.S. 935, 937-38 (1980) (Rehnquist J. (joined by Powell, J. & Burger, C.J.), dissenting from denial of certiorari). It is adherence to that principle which seems most in jeopardy following this court's opinion.

student transportation." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 253 (1973) (Powell, J., concurring in part and dissenting in part); *see* Court's Opinion at 53 (quoting same). Here, despite the school district's continued unitary status, this court retains jurisdiction and now orders the school district to racially balance the elementary schools which most certainly will require busing. Court's Opinion at 53. The court also orders the school district to racially balance the elementary faculties. *Id.* The district court is to proceed "with deliberate speed." *Id. See* W. Douglas, *The Court Years* 115 (1980) (discussing delay attributable to Justice Frankfurter's "all deliberate speed" language in *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955)).

Apparently, Justice Powell's view concerning transportation of elementary students was overlooked by this court. In fact, in the very next sentence of the passage relied upon by this court, Court's Opinion at 53, Justice Powell expressed his disapproval: "The single most disruptive element in education today is the widespread use of compulsory transportation, especially at elementary grades." *Keyes*, 413 U.S. at 253 (Powell J., concurring in part and dissenting in part). He urged a return "to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert." *Id.*; *see also Columbus*, 443 U.S. at 479, 486-87 (Powell, J., dissenting). Justice Powell's views concerning elementary transportation and other educational objectives, while perhaps not persuasive concerning an officially dual school system in 1973 when *Keyes* was decided, would seem to have greater force where, as here, a school system has achieved unitary status and seeks to enhance parental involvement, retain students and improve educational opportunity through a return to neighborhood schooling, only in grades 1-4, at the elementary level. The "more balanced evalua-

tion" of educational and social objectives is precisely what is missing from this court's resolution of the case.

I.

This court's opinion is faulty for three reasons: 1) improper reliance upon principles concerning the modification and termination of injunctions which are inapposite in the school desegregation context, 2) inadequate recognition of the legal effect of the school district's unitary status, and 3) insufficient deference to the factual findings of the district court concerning segregative intent.

A.

This case arises in the unusual procedural context of the district court finding the school system unitary in 1977 and terminating jurisdiction of the case. The case was revived when the school district adopted a new student assignment plan, although a 1972 decree had not been lifted. In *Dowell v. Board of Educ.*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986), this court determined that reopening the case was appropriate so that the plaintiffs would have an opportunity to be heard on the constitutionality of the plan. *Id.* at 1519.

Although *Dowell* did not express an opinion concerning the constitutionality of the neighborhood school plan at the elementary level, it cast the dispute in terms of injunction modification and termination law, and decided that a finding of unitariness does not alter the defendants' "duty to persist in the elimination of the vestiges of segregation." 795 F.2d at 1520. Of course, a finding of unitariness is inconsistent with remaining vestiges of state-imposed segregation (a constitutional violation), but in this case, the court adheres to its erroneous decision that "a finding of unitariness [does not] mandate the later dissolution of the decree without proof of a substantial change in circumstances which led to the issuance of that decree." Court's Opinion at 19.

Although the court in *Dowell* did not intend, even implicitly, to address the ultimate issue of constitutionality of the neighborhood school plan, 795 F.2d at 1523, the court framed the issue so as to give no practical effect to the 1977 unitariness finding. The school board retained the burden of proof that its conduct was not segregative; the plaintiffs only were required to prove that the 1972 decree had been violated. *Id.* at 1523. In its opinion, the court has adopted that approach and has given no effect to the principle that "the differentiating factor between *de jure* and . . . *de facto* segregation . . . is *purpose* or *intent* to segregate." *Keyes*, 413 U.S. at 208 (emphasis in original). This case really turns on the responsibility of these defendants to ameliorate the effects of residential separation so often found in urban locations, including Oklahoma City.

It is beyond dispute that the school board cannot take actions intended to perpetuate or re-establish a dual school system. *See Dayton II*, 443 U.S. at 538 (concerning student assignment, school construction and closings); *Columbus*, 443 U.S. at 460 (concerning school construction and closings); *Swann*, 402 U.S. at 21 (same). Here, the school board deviated from the student assignment plan contained in the 1972 decree (grades 1-4) because the plan no longer was equitable and the board sought to improve the quality of elementary education. Although the school board should have proceeded to district court to have the 1972 decree dissolved, its apparent belief that the 1977 finding of unitariness dissolved the decree was certainly understandable given the state of the law at the time. In any event, we now consider whether the 1972 decree should be enforced or modified. Court's Opinion at 8.

At the hearing below, both parties sought to modify the district court's 1972 decree requiring implementation of the Finger Plan. The defendants sought to retain their neighborhood school plan at the elementary level. The plaintiffs sought to eliminate, at

least in part, the neighborhood school plan and substitute in its place a new plan, prepared by Dr. Gordon Foster, which involved pairing and clustering schools and changing the grade structure of several elementary schools. The plaintiffs contended that the proposed plan was consistent with the 1972 decree, which they maintained had become inequitable, and they contended that the proposed plan was better than the neighborhood school plan. *See* rec. vol. I, doc. 17, app. A (final pretrial order — plaintiff's contentions).

Because the school district had *attained and maintained unitary status*, plaintiffs were required to demonstrate that the district had lost its unitary status through purposefully segregative school board actions. When the entirety of Supreme Court desegregation precedent is applied in the context of a unitary school district, I do not agree with this court that the findings of the district court are clearly erroneous. Rather those findings are supported by the record and merely reflect the district court's choice among expert and lay testimony, which at times conflicted, concerning direct and circumstantial evidence of segregative intent.

Moreover, I question retention of jurisdiction in this case given the unitary status of the school district. Four other circuits hold that current desegregation law does not envision continued federal jurisdiction in the affairs of local school districts in perpetuity once a school district becomes unitary. *See United States v. Overton*, 834 F.2d 1171, 1176, 1174-77 (5th Cir. 1987) ("We see *Dowell*'s effort to declare a school district to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness.") (Higginbotham, J.); *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("Although the [Supreme] Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities."); *Riddick v. School Bd.*, 784 F.2d 521,

535, 534-39 (4th Cir. 1986); ("[O]nce the goal of a unitary school system is achieved, the district court's role ends."); *Vaughns v. Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985) ("A district court's jurisdiction to grant further relief in school desegregation cases in not perpetual . . . . Once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts."); *Spangler v. Pasadena Bd. of Educ.*, 611 F.2d 1239, 1241 (9th Cir. 1979); *Id.* at 1247 ("Retention of jurisdiction when there is no longer a demonstrated need to monitor compliance may defeat important governmental and personal interests . . . . There is no warrant for retaining further jurisdiction in the case, and the district court should enter an order relinquishing all further jurisdiction.") (Kennedy, J., concurring)[2]; *but see United States v. Board of Educ.*, 794 F.2d 1541, 1543 (11th Cir. 1986) (per curiam) (when parties have relied on desegregation orders to make commitment to start desegregation process, it *may* be inappropriate to vacate such orders even after unitary status attained). *Contra Dowell*, 795 F.2d at 1516 (10th Cir.). This court's "semantic recasting of unitary status," *Overton*, 834 F.2d at 1176, in terms of prohibitory injunction law aimed at private parties and relief from judgment, Fed. R. Civ. P. 60(b), displaces the concept of unitary status and insures federal involvement, even in the absence of a constitutional violation.

To impose onerous duties on the school board, this court improperly relies upon desegregation passages involving dual systems charged with the affirmative duty to eradicate *de jure* segregation and its vestiges. *See, e.g.*, Court's Opinion at 37 (relying upon *Swann*'s quotation of *Green v. County School Bd*, 391 U.S. 430, 439 (1968), 402 U.S. at 13, for affirmative duty); Court's

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[2] The main opinion and the concurring opinion in *Spangler* are both opinions of the court; the third member of the panel joined in both. 611 F.2d at 1242.

Opinion at 48 (relying upon *Swann*, 402 U.S. at 28, for discussion of neutral assignment plans which may not be compatible with affirmative duty); Court's Opinion at 48 (relying upon *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971), for concept that desegregation plan must be effective, given *remedial* responsibility of local board); Court's Opinion at 22-23, 51 (relying upon *Dayton II*, 443 U.S. at 538, concerning board's affirmative duty not to perpetuate or reestablish dual school system and the heavy burden the board faces in explaining actions not consistent with the affirmative duty). We have a very different situation in this case — this board has met its affirmative duty and no longer is under "an unsatisfied duty to liquidate a dual system." *See Dayton II*, 443 U.S. at 538.

Under any test in which segregative intent is relevant, I cannot agree that the neighborhood school plan for the elementary grades 1-4 had "the effect of making the District '*un*-unitary' by reviving the effects of past discrimination." Court's Opinion at 37 (emphasis in original); *see also id.* at 50 ("the Plan restores the effects of *past* discriminatory intent remedied by the decree") (emphasis in original).[3] Of course, the word "un-unitary" seems unnecessary in the lexicon of school desegregation law; an "un-unitary" system is a dual system, and the inquiry here is whether the neighborhood school plan signals the return of a dual

[3] The blueprint for the court's approach to the substantive desegregation law, but not the injunction law, in this case is contained largely in B. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L. Rev. 789 (1988) [hereinafter cited as *Landsberg*] (cited in Court's Opinion at 20-21, 21 n.18 & 51 n.56). *Compare* Court's Opinion at 37 (concerning the effects of past discriminatory intent) *with Landsberg* at 817, 826, 837-38 (same); *compare* Court's Opinion at 50, 50 n.52 (concerning *Swann's* remedial baggage) *with Landsberg* at 819 (same); *compare* Court's Opinion at 48 (*Swann's* "loaded game board" and unitariness) *with Landsberg* at 826 (same); *compare* Court's Opinion at 51-52 & 51 n.56 (concerning extra-record evidence about Norfolk plan and white flight) *with Landsberg* at 830 & 830 n.51 (same); *compare* Court's Opinion at 16 (concerning compliance alone with injunctions) *with Landsberg* at 811 n.121 (same). Mr. Landsberg endorses the Tenth Circuit approach in *Dowell*, 795 F.2d at 1516. *Landsberg* at 815 n.135, 834-35.

system. This court overturns the district court's decision to dissolve the injunction implementing the 1972 desegregation plan for two reasons: 1) because the district court "failed to address or distinguish plaintiffs' contrary evidence," and 2) because the district court "cast the evidence on which it relied in a form to provide an answer to the single question of discriminatory intent . . . ." *Id.* at 49. Both reasons given by this court are wanting.

B.

Under Fed. R. Civ. P. 52(a) and *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), we are not at liberty to reverse the district court's factual findings unless they are clearly erroneous. Where, as here, "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* Admittedly, the failure to address truly contrary evidence may leave the door open for the court of appeals to find internal inconsistencies or implausibility in the evidence relied upon, *see id.* at 575, but the ultimate inquiry is whether the "district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* at 574. Considering what issues are material in this lawsuit, I would affirm the district court. There is ample evidence to support the finding that, even with the introduction of a neighborhood school plan in grades 1-4, the school board still operates a unitary system.

One of the most serious technical problems with this court's decision is the methodology of identifying racially disproportionate schools after implementation of the neighborhood plan. This court claims that 32 out of 64, or one-half, of the elementary schools are now "one-race majority schools." Court's Opinion at 22, 32, 44. We are told that only "[t]hirty-two elementary schools remained racially mixed." *Id.* at 7. This analysis is flawed. The district court properly was concerned with the emergence of 90%+ black schools as a

result of the neighborhood plan. *Dowell v. Bd. of Educ.*, 677 F. Supp. 1503, 1509-1510 (W.D. Okla. 1987). Here, this court correctly notes that 11 out of 64 elementary schools are 90%+ black after the plan. Court's Opinion at 6-7. But then the court adds to the number of racially disproportionate schools by deciding that if a school has less than 10.7% black enrollment, it is not racially mixed, regardless of the presence of other minorities. *See id.* at 7, 7 n.2. A significant portion of the data in this case only distinguished between black students and other students.[4]

[4]

Membership by School Race
K-4 Elementary Schools
Includes K-4 Portion of K-5 Elementary Schools
1986-87

School	Black	Other	Total	% Black
Adams	23	354	377	6.1
Arthur	23	291	314	7.3
Bodine	199	382	581	34.2
Britton	118	193	311	37.9
Columbus	63	349	412	15.2
Coolidge	23	420	443	5.1
Creston Hills	219	2	221	99.0
Davis	16	145	161	9.9
Dewey	248	4	252	98.4
Edgemere	154	146	300	51.3
Edwards	218	1	219	99.5
Eugene Field	150	321	471	31.8
Fillmore	17	246	263	6.4
Garden Oaks	181	3	184	98.3
Gatewood	68	196	264	25.7
Harrison	83	85	168	49.4
Hawthorne	64	269	333	19.2
Hayes	37	292	329	11.2
Heronville	31	314	345	8.9
Hillcrest	32	243	275	11.6
Horace Mann	67	123	190	35.2
Kaiser	38	171	209	18.1
King	278	3	281	98.9
Lafayette	6	212	218	2.7
Lee	22	309	331	6.6

While such data clearly indicates concentration of black students,[5] such an approach fails to recognize the presence of other minorities which increased since 1972; in 1985-86, non-black minorities comprised

School	Black	Other	Total	% Black
Lincoln	287	2	289	99.3
Linwood	32	202	234	13.6
Longfellow	230	2	232	99.1
Madison	30	170	200	15.0
Mark Twain	12	111	123	9.7
North Highland	315	8	323	97.5
Oakridge	125	170	295	42.3
Parker	347	11	358	96.9
Parmelee	41	305	346	11.8
Pierce	36	184	220	16.3
Polk	262	3	265	98.8
Prairie Queen	24	362	386	6.2
Putnam Heights	105	196	301	34.8
Quail Creek	31	204	235	13.1
Ridgeview	51	247	298	17.1
Rockwood	176	248	424	41.5
Sequoyah	58	238	296	19.5
Shidler	95	161	256	37.1
Shields Heights	16	385	401	3.9
Southern Hills	16	210	226	7.0
Spencer	264	82	346	76.3
Stand Watie	91	260	351	25.9
Star	212	133	345	61.4
Stonegate	170	343	513	33.1
Truman	369	1	370	99.7
Van Buren	15	178	193	7.7
West Nichols Hills	63	251	314	20.0
Western Village	208	109	317	65.6
Westwood	40	160	200	20.0
Wheeler	25	280	305	8.1
Willard	13	129	142	9.1
Willow Brook	200	188	388	51.5
Wilson	50	139	189	26.4
Subtotal	6,387	10,746	17,133	37.3
Arcadia	22	55	77	28.5
Buchanan	20	205	225	8.8
Johnson	51	137	188	27.1

13.3% of the elementary system enrollment (Hispanic, 6,8%; Native American, 4.2%; Asian-American, 2.3%). *See Dowell*, 677 F. Supp. at 1510; def. ex. 63, *reproduced in* Appellees' Addendum to Brief.

School	Black	Other	Total	% Black
Monroe	42	223	265	15.8
Rancho Village	18	151	169	10.6
Telstar	199	134	333	59.7
Total	6,739	11,651	18,390	36.6

Pl. ex. 27, *reproduced in* Appellants' Addendum to Brief at 187-91.

[5]

90%+ Black Elementary Schools

School	Black	Other	Total	% Black
Creston Hills	219	2	221	99.0
Dewey	248	4	252	98.4
Edwards	218	1	219	99.5
Garden Oaks	181	3	184	98.3
King	278	3	281	98.9
Lincoln	287	2	289	99.3
Longfellow	230	2	232	99.1
North Highland	315	8	323	97.5
Parker	347	11	358	96.9
Polk	262	3	265	98.8
Truman	369	1	370	99.7
Total	2,954	40	2,994	98.7

Pl. ex. 27, *reproduced in* Appellants' Addendum to Brief at 187-91. According to these figures, 43.8% (2954/6739) of the black elementary school population (1-4) attends a 90%+ black school.

This court took a slightly different approach to determining minority concentration in the elementary schools and concluded that 46.2% of the black K-4 elementary students attend a 90%+ black school. Court's Opinion at 32. The court's slightly higher 46.2% concentration figure is different than mine (43.8%) for two reasons. First, the court used the 1985-86 student enrollment data, pl. ex. 26, *reproduced in* Appellants' Addendum to Brief at 180-81; I used the 1986-87 data contained in pl. ex. 27, *reproduced in* Appellants' Addendum to Brief at 187-91, and the above table contains the 1986-87 data. Second, the court did not include the K-4 portion of the K-5 schools, I did. Had I followed the court's method with the 1986-87 data and not included the K-4 students which attend K-5 schools, the concentration figure would be 46.3% (2954/6387), meaning that 46.3% of the black K-4 elementary students attended a 90%+ black K-5 school.

This is a school district in which the elementary students are 50.7% white, 36.0% black and 13.3% other minority (total minority percentage of 49.3). *Id.* at 1510 (1985-86). If we compare the white enrollment with the aggregated number of minority students as is appropriate under *Keyes*, 413 U.S. at 197-98; *see also Riddick*, 784 F.2d at 527 n.7 (minority percentage aggregated, not expressed solely in terms of black enrollment), and as was done by the district court, 677 F. Supp. at 1509-10, the 21 extra schools identified by this court range from 13.8% (Lafayette) to 58.5% (Willard) minority enrollment – these extra 21 schools are not one-race schools, even if they do not contain the system-wide average (40%) of black students.[6] In-

Dr. Foster estimated that 2,445 black 1-4 students attended virtually one-race black schools; these black students comprised 46% of the total black students in grades 1-4. Rec. vol. VIII at 1298.

[6] The following 21 schools are not racially mixed according to this court. *See* Court's Opinion at 7, 7 n.2.

K-4 Elementary Schools
Membership by School
1985-86

School	% White	% Black	% Minority*
Lafayette	86.2	2.0	13.8
Shields Heights	66.9	4.0	33.1
Hillcrest	84.5	5.1	15.5
Arthur	79.8	5.7	20.2
Rancho Village	83.8	5.8	16.2
Prairie Queen	84.7	6.2	15.3
Parmelee	79.0	6.3	21.0
Davis	65.1	6.6	34.9
Willard	41.5	6.6	58.5
Coolidge	81.1	7.3	18.9
Buchanan	80.0	7.5	20.0
Lee	55.5	7.7	44.5
Southern Hills	79.0	8.0	21.0
Van Buren	75.7	8.4	24.3
Adams	80.0	8.5	20.0
Fillmore	80.8	8.7	19.2
Linwood	85.1	9.2	14.9

deed, some of these schools approach the elementary system-wide minority percentage, e.g. Lee, 44.5% minority; Willard, 58.5%. Insofar as the permissible inference of segregative intent is concerned, the 21 schools identified by this court simply do not have the same implications as the eleven 90%+ black schools.[7] This is true notwithstanding Dr. Finger's reluctance to agree that schools which have more than 10% minority enrollment, but less than 10% black enrollment, are not segregated white schools. *See* Court's Opinion at 29-30.

Indeed, one of the limitations of the 1972 Finger Plan is that it sought racial balance only with respect

School	% White	% Black	% Minority*
Wheeler	61.7	10.0	38.3
Madison	78.0	10.5	22.0
Hayes	81.0	10.7	19.0
Mark Twain	67.9	10.7	32.1

*Includes Black, Hispanic, Native American and Asian-American.

Def. ex. 63, *reproduced in* Appellees' Addendum to Brief. None of these schools are virtually one-race white schools. Though these schools contain less than the system-wide average of black students, 38.5%, pl. ex. 26, *reproduced in* Appellants' Addendum to Brief at 184, and less than the system-wide average of K-4 black elementary students, 36.04%, *id.* at 181, there is no requirement "that every school in every community must always reflect the racial composition of the school system as a whole." *Swann*, 402 U.S. at 24.

[7] The school board planned to close 2 of the 90%+ black elementary schools (Lincoln & Truman) and reopen 1 (Dunbar) at the end of the 1986-87 school year. Def. ex. 65. The 1987-88 membership projections for the remaining elementary schools reveal ten 90%+ black elementary schools. *Id.* These schools are as follows:

School	% Black
Creston Hills	99.0
Dewey	98.4
Dunbar	98.9
Edwards	99.5
Garden Oaks	98.3
King	98.9
Longfellow	99.2
North Highland	97.5
Parker	96.9
Polk	98.8

to black students. Rec. vol. III at 321. Dr. Biscoe, school administrator, was aware of this feature and testified that notwithstanding, it is important to look at total minority percentages, not just black, when evaluating the district. She said:

> Since I work a lot with federal programs and attend a lot of those meetings, as I've gone around the country one thing I've noticed that happens in many of the school districts is that people look at the percent of minority students in their district, including Orientals, Native American students, Hispanic students.
>
> Of course[,] if you look at our district in terms of total minority population as compared to white population, you get a totally different picture than if you just look at those data black-white.

Id. The district court correctly decided to aggregate minority percentages when reviewing the effects of the neighborhood plan.

Although the district court is criticized for its finding concerning intent, Court's Opinion at 49, it is apparent that this court is merely reweighing the evidence and crediting the circumstantial evidence of segregative intent — namely the emergence of one-race schools. *See id.* at 45-49. Of course, reweighing the evidence is not consistent with our appellate function. *See* 5A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 52.03[1] (1989). This court is under the mistaken impression that circumstantial evidence of segregative intent *must* be preferred in these types of cases. *See* Court's Opinion at 47 (quoting *Keyes v. School Dist. No. 1*, 670 F. Supp. 1513, 1516 (D. Colo. 1987), *appeal pending*, Nos. 85-2814 & 87-2634 (10th Cir. submitted

Jan. 17, 1989).[8] Despite the court's contrary conclusion, the district court properly weighed all of the evidence and came to a permissible conclusion that there was an absence of segregative intent necessary to support a constitutional violation.

C.

Another obvious problem with the court's resolution of this case is its reliance upon general principles concerning the modification of injunctions when principles specifically concerning the process of desegregation have been enunciated by the Supreme Court. This court relies upon the standard of *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), an antitrust case, for the proposition that, despite unitariness, the school board must show that the condition the injunction was designed to protect against has abated and the failure to modify the injunction will result in extreme hardship to the school board. Court's Opinion at 14-18. It is not enough that the constitutional violation has been remedied. *Id.* at 16-17 ("The condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing."). This court severs the integral link between the desegregation decree and an extant constitutional violation contending that " 'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate.' " *Id.* at 16 (quoting T. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101, 1105 (1986)). How ridiculous that an injunction, meant to effectuate the law, "becomes an edict quite independent of the law it is meant to effectuate." *See id.*

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[8] This court repeatedly cites the district court decisions in *Keyes*, 609 F. Supp. 1491 (D. Colo. 1985), and 670 F. Supp. 1513 (D. Colo. 1987). *See* Court's Opinion at 22, 25 n.23, 31-32, 47. Those two decisions are now *on appeal* to another panel of this court.

II.

Given the court's position on insuring prospective relief even in the absence of a constitutional violation, unitariness is not a bar to reconsideration of the decree. Court's Opinion at 17. The court tempers its reliance on the exacting standard required for modification of injunctions by citing the dissenting portion (without so indicating) of Judge Higginbotham's opinion in *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1056 (5th Cir. 1986) ("By its forward cast, an injunction contemplates change and thus must be sufficiently malleable to adapt the ordered relief to contemporary circumstances.") (Higginbotham J., concurring in part and dissenting in part). *See* Court's Opinion at 17; *see also Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976) (recognizing propriety of modification when there is continuing supervision). Moreover, Judge Higginbotham, writing for a unanimous panel, quite firmly has rejected this court's approach in *Dowell. Overton*, 834 F.2d at 1174-77.

Swift simply does not apply to the vast majority of desegregation decrees. In *Spangler v. Pasadena Bd. of Educ.*, Justice (then judge) Kennedy explained the inapplicability of *Swift* to a district court's termination of equitable jurisdiction in school desegregation cases. *Spangler*, 611 F.2d at 1245 n.5.

> *Swift* involved the efforts of antitrust defendants who had entered into a consent decree prohibiting anticompetitive actions to modify the decree by lifting some of its prohibitions. It is doubtful the case supports the district court's retention of jurisdiction. *Swift* establishes general criteria for dissolution or modification of prohibitory injunctions against private wrongdoers. More recent Supreme Court desegregation decisions have established specific criteria for dissolution of regulatory injunctions imposed upon public

> school authorities . . . [T]hese criteria recognize (1) that the proper function of a school desegregation decree is remedial, and (2) necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. *See Milliken v. Bradley [Milliken II]*, . . . 433 U.S. [267,] at 280-82, 97 S. Ct. 2749 [(1977)].

Id. Justice Kennedy's reasoning is equally applicable to this court's retention in perpetuity of equitable jurisdiction over a unitary system, using the desegregation decree as the vehicle.

Virtually all of the cases relied upon by this court in its application of *Swift* involve unsuccessful attempts to obtain, modify or dissolve injunctions which forbid or limit private commercial conduct; in the main, they concern prohibitory private injunctions. *See* Court's Opinion at 14-18; *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 679-80 (10th Cir. 1988) (declining to vacate injunction prohibiting securities firm from engaging in deceptive practices), *cert. denied*, 109 S. Ct. 1172 (1989); *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 797-98, 799 n.7 (10th Cir. 1979) (Title VII consent decree not modified), *cert. denied*, 446 U.S. 952 (1980); *SEC v. Thermodynamics, Inc.*, 464 F.2d 457, 458 (10th Cir. 1972) (declining to modify injunction prohibiting individual from violating registration and antifraud provisions of 1933 Act), *cert. denied*, 410 U.S. 927 (1973); *SEC v. Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970) (reinstating injunction prohibiting company and individual from selling mineral interests or any other security in violation of 1933 Act); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 807 n.1 (8th Cir.) (declining to modify injunction prohibiting energy company from using trademark or trade name), *cert. denied*, 395 U.S. 905 (1969); *but see United States v. W.T. Grant Co.*, 345 U.S. 629, 630 (1953) (affirming denial of injunction).

The one case concerning a public injunction relied upon by this court is *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983) (McKay, J. & Doyle J.), *cert. dismissed*, 465 U.S. 101 (1984). The case involved the district court's jurisdiction to require prison authorities to submit: 1) a policy statement, and 2) a plan to avoid a return to unconstitutional prison conditions, and indicate when compliance with an earlier stipulation concerning prison conditions could be expected. *Id.* at 1540. This court understood that the district court order was "limited in scope and . . . targeted to assure compliance with past decrees and to prevent a recurrence of unconstitutional conditions." *Id.* at 1540. The school desegregation cases were cited as authority for the court's decision. *Id.* at 1538, 1538 n.3.

Under the *Swift* standard it is "virtually impossible" to vacate or modify an injunction when the beneficiary of the injunction does not consent. *SEC v. Blinder, Robinson & Co.*, 855 F.2d at 679. Thus, from a practical perspective, the *Swift* line of cases are ill-suited for deciding when a desegregation decree should be terminated or modified on motion of a school board. Desegregation decrees are primarily mandatory injunctions, rather than prohibitory injunctions, and involve complex affirmative commands often concerning student and faculty/staff assignment. *See* D. Dobbs, *Handbook on the Law of Remedies*, § 2.10 at 105 (1973). As the volume of litigation indicates, the framing and enforcement of a desegregation decree is more complex than merely prohibiting an act.

Another reason why the *Swift* line of cases is inappropriate is that desegregation decrees are not designed to operate over several decades. *See* Court's Opinion at 16 n.12 (noting *Swift* decrees were in effect

for 76 years). As Dr. Finger testified in this trial, he would have expected that his 1972 plan "would have been quite extensively modified." Rec. vol. VIII at 1198. For example, he did not expect that the fifth-year centers would be retained, but rather would have been incorporated into the middle schools. Rec. vol. VIII at 1198-99. Nor did he expect that there would be resistance to "stand-alone" schools, for one of the traditional objectives of desegregation planning is "to make as many naturally desegregated schools as you can make." *Id.* at 1200.

Dr. Finger's testimony underscores why compliance to the letter with a desegregation decree over an unlimited time span would be inappropriate. In explaining his reaction to the unexpected retention of the fifth-year centers contained in his 1972 plan, he said:

> [A] lot of things happened . . . that people didn't anticipate, . . . that our cities would become more minority, that birth rates would change, that the . . . number of white children in cities would change. A lot of things have happened since 1972. The world today is not the same as it was in 1972, . . . and very drastic changes have taken place, and I . . . know its been difficult for the school board and the school department to contend with all these differences that occurred, . . . and I can see that these decisions are really tough.

Id. at 1199. A school district does not have the luxury of ignoring change; it is part of a dynamic system continually confronted by demographic and social forces not of its own making. *See Swann*, 402 U.S. at 31-32. The *Swift* standard has been applied in the context of terminating antitrust injunctions, or other commercial injunctions between private parties. Applying the *Swift* standard to the modification or termination of school desegregation orders is unwarranted and impractical.

From the beginning, the Supreme Court recognized the need for "practical flexibility" in "effectuat[ing] a transition to a racially nondiscriminatory school system." *Brown II*, 349 U.S. at 300-01. The Court also recognized the need for continued oversight and adjustment during this period. *Id*; *Green*, 391 U.S. at 439 (continued evaluation by district court needed). In the remedial phase, the Court has insisted upon flexibility, *see, e.g., Swann* 402 U.S. at 28, which is inconsistent with the fixed nature of the relief generally founded in cases following *Swift*. Indeed, at the conclusion of its opinion, this court recognizes the need for continual redrafting of desegregation decrees, but only for the plaintiffs in school desegregation litigation, not for the defendants. Court's Opinion at 52; *see also id.* at 15 n.11 (relying upon *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248-49 (1968)).[9] Despite this court's protestations to the contrary in its revised opinion, Court's Opinion at 53 n.57, the standard it adopts for modification of desegregation decrees at the request of defendants is far more difficult than the standard for plaintiffs.

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[9] This court's reliance on *United Shoe*, another antitrust case, is further evidence of the paucity of direct authority supporting its position. *United Shoe* involved one firm's monopolization of the shoe machinery industry; the injunction dissolved the firm into three separate companies. *Id.* at 246. Were we embarking upon some new and uncharted field of law, reliance upon antitrust cases might be justified. However, and with all due respect, I believe that the plethora of desegregation cases decided during the last three decades affords the court a more fruitful source of precedent than tangentially-related antitrust cases; the logical nexus between school children and shoe machinery is a strained one indeed.

This court's reliance upon *Swann*, 402 U.S. 1 at 15-16, to support application of commercial prohibitory injunction cases in the school desegregation context is misplaced. Court's Opinion at 13 n.8. The Supreme Court did say that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial *of a constitutional right.*" *Swann* at 15-16 (emphasis supplied). However, the commercial injunction cases relied upon by this court hardly involve the denial of constitutional rights. Moreover, the Court in *Swann* emphasized that "judicial powers may be exercised only on the basis of a constitutional violation," and that "[j]udicial authority enters only when local authority defaults." *Id.* at 16.

III.

In deciding whether a desegregation decree should take on a life of its own after unitary status has been achieved, it is well to keep in mind the purpose of and criteria for the design of equitable relief in the remedial phase of school desegregation cases. The purpose of the relief is to eliminate an unconstitutional dual school system and its vestiges arising from state-imposed segregation. *Swann*, 402 U.S. at 15, 28. In devising a remedy, three factors predominate: 1) the nature and scope of the constitutional violation determines the remedy, *Swann*, 402 U.S. at 16; *see also Pasadena*, 427 U.S. at 434; *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 738 (1974), 2) the decree must be remedial, designed to restore the victims of discriminatory conduct to the position that they would have been in had the discriminatory conduct not occurred, *id.* at 746, and 3) the district court must consider the value of state and local control of public education, *Dayton I*, 433 U.S. at 410. *Milliken II*, 433 U.S. at 280-81. Of course, local school district boundaries and policies must be set aside if they conflict with the dictates of the fourteenth amendment. *Milliken I*, 418 U.S. at 744. But in this case, all of the above factors have not been applied; instead a new long-term remedy has been imposed under the guise of an extension of the old, without due regard for the restitutionary purpose of a desegregation remedy and the importance of local control. This comes as no surprise because the court "approach[es] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." Court's Opinion at 4, *but see id.* at 21-22 n.19 ("[O]ur focus is upon the issue of desegregation.").

The Supreme Court's desegregation cases suggest that a district court's jurisdiction is finite and that the decree does not survive the termination of jurisdiction. The Court envisioned a "period of transition" "to a racially nondiscriminatory school system." *Brown II*, 349 U.S. at 301. A "transition" is defined as "a passage or movement from one state, condition, or place to another." *Webster's Third New Int'l Dictionary* at 2428 (1981). In *Green*, the Supreme Court spoke of "convert[ing] to a unitary system" and "retain[ing] jurisdiction until it is clear that state-imposed segregation has been completely removed." 391 U.S. at 438-39. The goal was "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Id.* at 442. In *Raney v. Board of Educ.* 391 U.S. 443 (1968), decided the same day as *Green*, the Court held that rather than dismissing a desegregation complaint, a district court should "retain jurisdiction until it is clear that disestablishment had been achieved." *Id.* at 449.

In *Swann*, Chief Justice Burger, writing for a unanimous Court, indicated that the role of the federal court would end at some time. 402 U.S. at 31-32. The Court further recognized that the school desegregation cases are not the appropriate vehicle for alleviating the effects of other private or public action which might result in segregation.

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds . . . . The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

Swann, 402 U.S. at 22-23. Although that the Court did not address other state action which might contribute to disproportionate racial concentrations in some schools, *id.* at 23, the Court discussed limitations on federal equitable power and said:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id. at 31-32.[10] This suggests that a desegregation decree does not have an unlimited life, once the constitutional violation is remedied. This view is consistent with the Court's earlier comment that "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial

[10] This court tells us that "*Swann* envisioned stability 'once the affirmative duty to desegregate has been accomplished and racial discrimination through official action has been eliminated from the system.' 402 U.S. at 32." Court's Opinion at 37 n.39. The above passage indicates just the opposite: demographic stability was *not* envisioned.

basis." *Id.* at 28. Nevertheless, this court's command for racial balancing is judicially ordered assignment in the absence of a constitutional violation. It is notable that the Court did not hold that the district court could deal with future problems after unitary status by relying upon a violation of the last injunctive decree; rather, the district court can fashion a remedy based upon current conditions, or upon showing of purposeful resegregation, a constitutional violation.

In *Pasadena*, the Supreme Court held that once a desegregation plan concerning student assignment had achieved its objectives, and no showing is made of intentionally segregative actions by the school board, the district court's role in student assignment comes to an end. 427 U.S. at 435-437. This court distinguished *Pasadena* in *Dowell* as a case in which "an aggrieved party sought remedial relief in addition to the previous decree." 795 F.2d at 1522. But in *Pasadena*, the school board, "requested the District Court to dissolve its injunctive order requiring that there be no school in the [district] with a majority of any minority students enrolled." *Pasadena*, 427 U.S. at 431; *see also id.* at 428-29 (setting out relief requested by school board); *Spangler v. Pasadena Bd. of Educ.*, 375 F. Supp. 1304, 1305 (C.D. Cal. 1974) (relief sought by school board), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *vacated and remanded*, 427 U.S. 424 (1976). Thus, contrary to this court's assumption, *Pasadena* was not a case "in which an aggrieved party sought remedial relief in addition to the previous decree" or "an attempt to achieve further desegregation based upon minor demographic changes not 'chargeable' to the board." *See Dowell*, 795 F.2d at 1522. The court's characterization is understandable only if compliance with the plan is viewed as an attempt to achieve further desegregation.

The court in *Dowell* also suggested that *Pasadena* was explainable in terms of "minor shifts in demographics or minor changes in other circumstances which are not the result of an intentional and racially

motivated scheme to avoid the consequences of a mandatory injunction. . . ." 795 F.2d at 1522. The court then contrasted this case with *Pasadena* because this case involves abandoning the 1972 desegregation plan in favor of a plan "which *appears* to have the same segregative effect as the attendance plan which generated the original lawsuit." *Id.* (emphasis in original).

The rationale of *Pasadena* and *Swann* consistently address the limits of federal equitable power when unitariness has been attained and constitutional violation abated. The result of *Pasadena* turns, not upon the size of the racial imbalance or demographic shift, but rather, upon whether the school district engineered an unconstitutional separation after achieving unitariness with respect to student assignment. 427 U.S. at 434.

A dispassioned reading of *Pasadena* also seriously undercuts this court's view that the 90%+ black schools in this case are ipso facto an effect of past discriminatory intent. *See* Court's Opinion at 50. In *Pasadena*, 5 out of 32 schools had majority black student enrollments just four years after the 1970 decree implementing the desegregation plan. 427 U.S. at 431. Yet, because the school board was not responsible for creating this situation, readjustment was not necessary. Attendance areas could be left as they were. Finally, *Pasadena* made it clear that a school system can be unitary with respect to student assignment, even if it is not with respect to faculty/staff assignment. *Id.* at 436.

IV.

Resuscitating the 1972 decree in this case has the effect of vitiating any benefits of unitary status for the school district. As noted by the Fifth Circuit:

> The difficulty with *Dowell*'s approach is that it denies meaning to unitariness by failing ever to end the judicial superintendence of schools. Of course, school districts cannot escape the duty to maintain their school systems in conformity with the Constitution. Attaining unitary status, however, means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the Constitution. As we have said, a school district is released from the consequences of its past misdeeds when it eliminates the vestiges of a segregated system and achieves a true unitary system.

Overton, 834 F.2d at 1175 (footnote omitted). Redemption is not the hallmark of this court's approach, but there are several other reasons why the approach of *Dowell* as realized in this case, is not in keeping with the mechanics of school desegregation litigation.

Most critical is the burden of proof. Without question, this court today has placed upon the unitary school district the same burden it would have, had it operated a statutorily or officially dual school system yesterday. This court's first error is in assuming that certain concepts associated with becoming unitary such as "affirmative duty" and "maximum practicable desegregation," Court's Opinion at 21-22, have equal relevance once the district has attained and maintained unitary status. This court reasons that once the plaintiffs have shown that the injunction has not been complied with, here because of the emergence of the inflated 32 out of 64 "one-race majority" schools, *see supra* p. 10-19, the defendants have the burden of showing "changed circumstances or oppressive hardship." Court's Opinion at 22.

What this means is that the school board is put back at the "proverbial first square." *See id.* at 16. Indeed, in its discussion of the burden of proof, this court resurrects two presumptions: one applies when a prima facie case of intentional segregation by school authorities has been proven; the other applies once a

system-wide violation has been established and a remedy is being implemented. Court's Opinion at 21-23; *see also Dowell v. Board of Educ.*, 465 F.2d 1012, 1014 (10th Cir.) (presumptions applied to Oklahoma system), *cert. denied*, 409 U.S. 1041 (1972). This court relies upon *Dayton II*, 443 U.S. at 538, as quoted in *Clark v. Board of Educ.*, 705 F.2d 265, 271 (8th Cir. 1983)[11] for the presumption that actions which increase or continue the effects of a dual system are inconsistent with a school board's affirmative duty to liquidate that system, and that the board faces a heavy burden in providing an explanation for such actions. *See* Court's Opinion at 23. The court also discusses the *Swann* presumption against one-race schools, 402 U.S. at 26, in the remedial phase of desegregation litigation.

To understand the problems with this court's approach, it is necessary to understand how the burden of proof is allocated before a school district becomes unitary. In a system that was statutorily or officially dual, plaintiffs may establish the prima facie case by proving that there is a current condition of intentional segregation; that the *de jure* system or its vestiges remain or were reestablished in part of the school system. *Columbus*, 443 U.S. at 463-68. Even an isolated condition of current intentional segregation would violate the affirmative duty to eliminate the dual system and its vestiges and to convert to a unitary system in which racial discrimination is eradicated. *Dayton II*, 443 U.S. at 537; *Columbus*, 443 U.S. at 459; *see also* L. Tribe, *American Constitutional Law* 1498-1500 (2d ed. 1988) (discussing Supreme Court school desegregation cases).

That critical finding shifts the burden of proof to the defendants because it provides "a sufficient basis for an inferential finding of systemwide discrimina-

[11] In *Clark*, a modification of a desegregation plan was approved which resulted in 4 out of 27 elementary schools having all black enrollments. 705 F.2d at 272-74.

tory intent," which in turn will be applied to explain "racial separation in other parts of the school system." *Columbus*, 443 U.S. at 467-468. At that point, the school defendants must come forward with "proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes*, 413 U.S. at 210. If intent cannot be disproved, the defendants must show that their "past segregative acts did not create or contribute to the current segregated condition," in other parts of the system. *Id.* at 211. Before a determination of unitariness, the "board has a 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." *Dayton II*, 443 U.S. at 538.

To summarize, "once a court has found an unlawful dual school system, the plaintiffs are entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests upon the defendants." *School Bd. v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). Where, as here, the system has achieved unitariness, the presumption ends. *Id.*; *see also Riddick*, 784 F.2d at 543.

But in this case, the court not only has failed to terminate the presumptions which resulted in the 1972 decree, but also has added new burdens for the school board. Now, the school board must bear the same burden it was under when discharging its affirmative duty to liquidate a dual school system, *and* it must also demonstrate that deviating from the 1972 decree would result in such extreme and unexpected hardship as to render the decree oppressive. *See* Court's Opinion at 23. According to the court, the school board was required to meet its evidentiary burden "by clear and convincing evidence." Court's Opinion at 17. It is easy to understand why concerns with educational effectiveness, parental involvement, student retention and the inconvenience of forced transportation pale in comparison to such a draconian standard.

Thus, I cannot agree with the court that the school district's "burden is not alleviated after a finding of unitariness when the decree remains in place." *Id.* at 23. As noted by the Fifth Circuit, it matters little whether we call it "maintenance of a decree or dispensing with proof of purpose or shifting the burden of proof" because the effect is the same: federal judicial power displacing local control long after schools which were once part of a dual system are "just schools" in a unitary system. *Overton*, 834 F.2d at 1176. Rejecting the argument that a unitary school district must continue with a burden to prove continually that its decisions are free of segregative purpose, the Fifth Circuit commented upon the relationship between unitary status and the school district's burden of proof.

> The elements of a violation and who must bear the burden of proof are not conceptually distinct from unitary status but are its components; indeed, the contrary assertion is dissembling. In the real world of trial and uncertain proofs, a perpetual placement upon a school board of the burden of persuading its innocence of conduct with segregative impact differs little in effect from the superintendence that attends an extant decree and pending suit.

Id. at 1176. The acknowledgment of the school district's unitary status, *Dowell*, 795 F.2d 1522; Court's Opinion at 6, 37-38, while requiring the school board to retain the burden of proof (and presumptions against it) in addition to the additional burden of meeting the *Swift* criteria for modifying a decree, proves too much. It not only "denies the essence of unitariness," but may very well impose greater substantive burdens on the school board than before the unitariness finding. *See Overton*, 834 F.2d at 1176.

In its amicus brief, the United States argues that the continuation of the court's jurisdiction in this case

via the 1972 decree was inappropriate because of the successful dismantling of the dual school system as signified by unitary status. United States' Brief at 5. This Court responded that it "was unwilling to revise Rule 60(b) to accommodate this position." Court's Opinion at 38 n.41. Rule 60(b) would hardly need revision to accommodate the legal consequences of a determination of unitary status. The court then rejects the government's argument that "[e]ven if sustained compliance with the plan is not dispositive in the unitariness inquiry, it is entitled to great weight and should create at least a *presumption* of unitary status," United States' Brief at 9 (emphasis in original). Court's Opinion at 38 n.41. While there is a difference between a presumption and relevant evidence, one would expect that sustained compliance with a plan would be highly relevant evidence in a unitariness inquiry.

Indeed, this court just above said that "the good faith of the school officials in the desegregation effort" was a unitariness[12] factor. Court's Opinion at 37. *See Brown v. Board of Educ.*, No. 87-1668, slip op. at 25 (10th Cir. filed Jun. 2, 1989 & withdrawn Jul. 19, 1989); *Morgan*, 831 F.2d at 321 (good-faith compliance with court's plan is a factor in deciding unitariness);[13]

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[12] This court indicates that a district court is not to retry issues embodied in the original judgment, when passing on a defendants' request for modification or termination of an earlier decree. Court's Opinion at 20. Presumably that admonition would encompass the 1977 unitariness determination inherent in the 1977 judgment. *See Dowell*, 677 F. Supp. at 1505 (discussing 1977 unitariness determination in judgment). Yet this court's subsequent discussion of the elements of unitariness, in the context of judging any modification sought by the defendants, is revelatory of a procedure which will replicate the original unitariness determination any time the defendants seek modification of the decree. *See* Court's Opinion at 37-38. It is patently obvious in this case that the plaintiffs are attacking the 1977 determination of unitariness as erroneous. *See* Appellants' Brief at 25 ("Plaintiffs' position is that school desegregation is required because the effects of the long-maintained dual *school* system in Oklahoma City persist.") (emphasis in original).

[13] Citation of *Morgan* in this court's discussion of post-unitariness criteria that a new student assignment plan must meet, Court's Opinion at 37-38, is inconsistent with the meaning

Ross v. Indep. School Dist., 699 F.2d 218, 226 (5th Cir. 1983) (court considered "good-faith efforts to dismantle the dual school system" and declared system unitary).[14]

In justifying its approach, this court explains that it is concerned with the future value of an injunction, not with "fix[ing] for all time equitable relief mandated by constitutional considerations on the basis of present conditions." Court's Opinion at 38 n.41. The court reasons that "[t]he extension of the government's theory portends minority citizens have no assurance of any but short-term and pyrrhic victories." *Id.*

However, during the period in which the constitutional violation is being remedied, a federal court *is* empowered to make changes in the equitable decree. The relief is not "fixe[d] for all time." Moreover, this court's concern with the absence of a remedy for minority citizens undervalues the force of 35 years of desegregation cases and the alacrity with which a

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and significance the First Circuit placed on a unitariness determination. As the First Circuit explained:

> Although the Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities. Thus, when a court finds that discrimination has been eliminated "root and branch" from school operations, it must abdicate its supervisory role, in recognition that the "local autonomy of school districts is a vital national tradition."

Morgan, 831 F.2d at 318, 326 (quoting *Dayton II*, 433 U.S. at 410, and refusing further enforcement of student assignment portion of desegregation decree).

[14] This court notes that "[i]n Ross, despite its finding of unitariness after 12 years of court-supervised desegregation, the Fifth Circuit affirmed the district court's decision to retain jurisdiction for an additional 3 years." Court's Opinion at 38 n.40. This certainly does not support this court's retention of jurisdiction in this case after all the years that have passed since the 1977 unitariness determination. As the Fifth Circuit so recently reminded us, citing *Youngblood v. Board of Pub. Instruction*, 448 F.2d 770, 771 (5th Cir. 1971), its jurisprudence requires that a district court retain jurisdiction for 3 years after a unitariness determination, with semi-annual reports to the court by school authorities, to be followed by notice and a hearing as to why the case should not be dismissed. *Overton*, 834 F.2d at 1174-75, 1175 n.12.

fresh judicial remedy can be imposed upon a showing of purposeful discriminatory action taken by the school board.

In an effort to limit its holding, this court tells us in its revised opinion that it is merely relying upon the district court's power to enforce its equitable remedy, which "does not die until the remedy expires." Court's Opinion at 19-20 n.17. The problem with this analysis is that a remedy *imposed* and *enforced* by a court to correct racial discrimination should expire once the condition which offends the Constitution is alleviated. *Overton*, 834 F.2d at 1176. This court states that its holding is limited because the district court will cease active supervision upon a finding of unitariness, and the district court "retain[s] post-remedy authority over a school district" only "to enforce, modify, or vacate its decree." Court's Opinion at 19-20 n.17. This construct is pure sophistry. The school district will operate under a court-imposed decree, and the parties will have to repair to federal court to get the decree changed. The earlier finding of unitariness in no way lessens the obligation: the district court will never cease active supervision.

This court's laudable purpose for retaining jurisdiction is embedded in an unfortunate rationale which assumes that the arduous gains in racial equality will be lost should the school board be freed of federal control. The Fifth Circuit has addressed the same argument, rejecting the rationale of *Dowell*, 795 F.2d at 1516:

> **The argument's essence is that school districts that have intentionally discriminated are not to be trusted with the freedom of the Constitution. It rests upon a fear that the fourteenth amendment, proscribing as it does only purposeful discrimination, inadequately protects desegregation gains, at least at the hands of a former wrongdoer.**

> We are not persuaded. Whatever the power of Congress to so circumscribe the freedom of state actors, such as not requiring proof of purposeful discrimination in employment, the contended for judicial rule is here a heady call for raw judicial power. It is not that we deny the risk; the risk of wrong decision is inherent in the freedom to choose, and we are not so naive as to believe that we are no longer vulnerable to racism, if such insights are to overtly inform our judgment.

Overton, 834 F.2d at 1176. Though there be a risk, it is a risk which must be taken if ever a local school system is to function independently.

It might appear that this court's perpetual supervision of the school board has been vindicated here, because the school board, incorrectly believing it was free of federal control, enacted a neighborhood school plan which resulted in 11 out of 64 schools having a virtually one-race and black enrollment. However, as discussed below, the district court considered and rejected this circumstantial evidence of segregative intent, given the golconda of contrary evidence offered by the school board. Significantly, the school board has retained elements of the Finger Plan at all but the elementary level (1-4), and has taken other steps which certainly suggest an absence of segregative intent. Approximate racial balance is retained through busing in grades 5-12. The district court's decision rests upon ample evidence; the points raised by this court go to the weight of the evidence, not its sufficiency.

V.

Apart from the clearly erroneous standard which governs our review of the district court's factual findings concerning unitariness, *Riddick*, 784 F.2d at 533, it is important to understand the importance of intent. After informing us that once a decree is in place, "the

intent of the defendants has little, if any, relevance," Court's Opinion at 18, the court devotes a significant portion of its opinion to discussing intent. *See* Court's Opinion at 45-49.

The lifting of the decree should be the natural result of attaining unitary status. Thereafter, the basis for a system-wide remedy should be another intentional violation of the Constitution by school officials. The district court found that the only evidence which was indicative of segregative intent was disproportionate impact upon some black students. *Dowell*, 677 F. Supp. at 1517. The district court, relying on *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977), and *Dayton II*, 443 U.S. at 536 n.9, declined to find segregative intent based upon the attendance patterns of the plan.

Reviewing the trial transcript, this court perceives that the district court's focus was too narrow and that it "overlooked the broader inquiry mandated by *Swann*." Court's Opinion at 46. Of course, the cases this court relies upon involve the affirmative duty to desegregate dual school systems. This court also relies upon *Diaz v. San Jose Unified School Dist.*, 733 F.2d 660, 666 (9th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985), involving a California state-law affirmative duty to desegregate *regardless* of the cause of segregation. No such state law is involved in this case, and the affirmative duty to desegregate has been accomplished, as evidenced by the repeated findings of unitary status. *See Dowell*, 795 F.2d at 1522 (1977 unitariness finding binding); *Dowell*, 677 F. Supp. at 1515-19 (system has retained unitariness from 1977 to present). Finally, this court quotes the district court decision in *Keyes*, 609 F. Supp. 1491, now on appeal, *see supra* note 8, which seems to say that the motivations and good faith of board members or school administrators is not relevant in deciding institutional intent. *See* Court's Opinion at 47. According to this court, only circumstantial evidence is available. *Id.* at 45-46 n.49, 47.

This is too categorical a view of the intent inquiry. Such an approach essentially makes a credibility determination in advance and, of course, credibility is properly left to the trier of fact, every time. Because the school district is directed by its board and acts through its agents (personnel), the district court certainly could consider testimony concerning whether the neighborhood school plan was enacted with segregative intent, just as it can consider good faith compliance with a desegregation plan in deciding unitariness. Had some school administrator testified that segregative intent motivated the plan, such testimony certainly would be relevant. In addition to the motivation for adoption of the plan, the district court also was required to and did consider the effect of the plan. Finally, in complying with this court's directive in *Dowell*, 795 F.2d at 1522-23, the court attempted to ascertain whether it was likely that a return to a dual system was imminent should the 1972 decree be dissolved.[15]

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[15] The district court is criticized for asking various witnesses whether the board adopted its neighborhood school plan with discriminatory intent, whether the school district was being operated in a unitary fashion and whether it was likely that the school district would return to a dual system if federal control were relinquished. Court's Opinion at 45-47, 45-46 n.49, 46-47 n.50. This court tells us that "[t]he issue of unitariness is a matter which only the court can decide." *Id.* at 45-46 n.49. So true of every issue in a bench trial. Unitariness is a factual finding made by the district court and reviewed by the appellate court under the clearly erroneous standard. *See Dayton II*, 443 U.S. at 534, 534 n.8; *Riddick*, 784 F.2d at 533; *see also Jenkins v. Missouri*, 807 F.2d 657, 666-68 (8th Cir. 1986) (en banc).

The district court was attempting to determine the motivation for the plan, whether school authorities were sensitive to their constitutional obligation to operate a unitary school district and whether lifting of the decree was likely to be accompanied by a return to the former dual school system. *See Dowell*, 677 F. Supp. at 1524 (finding that current school board "is conscientiously oriented to its duty to operate a unitary school system"). In accordance with *Keyes*, 413 U.S. at 196, the district court also was seeking direct evidence of staff and community attitudes concerning the school system. *Dowell*, 677 F. Supp. at 1518 (citing *Keyes*). Had the district court based its entire decision upon only the predictable responses to these questions, there might be a basis for rejecting its factual findings. But that most certainly is not the case. The district court considered the circumstantial evidence of segregative intent but decided the other way, given adequate evidence to the contrary. *Dowell*, 677 F. Supp. at 1509-10 (student assignment); *id.* 1517 (neighborhood attendance zones), *id.* at 1518-19 (faculty/staff assignment).

In its discussion of the lack of discriminatory intent underlying the neighborhood plan, the district court considered the testimony of plaintiffs' expert Dr. Marylee Taylor, who testified concerning "the longstanding impact of official policies of segregation and discrimination, institutional racism, and prejudice as reflected in areas such as residential patterns and attitudes toward school desegregation." Rec. vol. I, doc. 17, app. E at 3 (Pretrial Order, Plaintiffs' Witness List). After defense counsel ascertained that Dr. Taylor's testimony incorporated her three day visit to Oklahoma City, the following occurred on cross-examination:

Mr. Day:	Dr. Taylor, it sounds to me from listening to your testimony that you have reviewed a substantial amount of the evidence in this case; is that correct?
Dr. Taylor:	I have – I have certainly reviewed some of the evidence in this case. Yes.
Mr. Day:	And including prior case decisions and things of that nature.
Dr. Taylor:	Yes.
Mr. Day:	You've reviewed the K-4 plan, the Finger Plan and those sorts of things; correct?
Dr. Taylor:	Yes.
Mr. Day:	Based upon your educational background and experience and your review of the facts in this case, you don't feel that the Oklahoma City Board of Education adopted this plan with the intent to discriminate against blacks; do you?
Dr. Taylor:	I have no evidence of that at all. I did not mean to suggest it.

Rec. vol. VIII at 1237-38. This court tells us that the district court could not consider this last response by Dr. Taylor as supporting an absence of segregative intent by the school board because to do so would be to take the answer "out of context" and because Mr. Day's question which elicited it "is a non sequitur." Court's Opinion at 46-47, 46-47 n.50. Both reasons given by the court are without merit.

Given the scope of Dr. Taylor's testimony, the district court could accept her conclusion concerning an absence of segregative intent by the school board in enacting the neighborhood plan, while rejecting her theory, given all of the evidence to the contrary, that the 1972 Finger Plan had merely suspended the impact of earlier official discrimination and that linking schools to housing with a neighborhood plan recreated "the impact of earlier official discrimination in the schools." *See* rec. vol. VIII at 1225. In other words, the district court could find that the school system had changed since the 1972 decree and that the dual system and its vestiges had been eliminated.

Likewise the district court was not in error for failing to recognize a non sequitur contained in Mr. Day's last question, at least as the term is commonly understood. A non sequitur is "an inference or a conclusion that does not follow from the premises," or "a

The law requires the plaintiffs to prove discriminatory purpose. As the Supreme Court has explained "[t]he school desegregation cases have . . . adhered to the basic equal protection principle that the invidious

quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). "[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation . . . [But] actions having foreseeable and anticipated disparate impact are relevant to prove the ultimate fact, forbidden purpose." *Columbus*, 443 U.S. at 464. A district court may consider a school board's enactment of a neighborhood school plan which may lead to racial imbalance, as one factor among many, in deciding, " 'whether an inference of segregative intent should be drawn.' " *Id.* at 465 (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 255 (S.D. Ohio 1977), *aff'd in part and remanded in part*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979)). But "[t]he inference is permissible, not mandatory." *Higgins v. Board of Educ.*, 508 F.2d 779, 793 (6th Cir. 1974); *see also Alexander v. Youngstown Bd. of Educ.*, 675 F.2d 787, 792-93 (6th Cir. 1982); *Spangler*, 611 F.2d at 1245 ("A policy favoring neighborhood schools is not synonymous with an intent to violate the constitution") (Kennedy, J., concurring). Thus, a district court is not *required* to infer segregative intent when there is racial imbalance in some schools. *Id.*

The district court's task concerning intent has been summarized by the Sixth Circuit:

> It is thus the duty of the District Court to determine whether, on the facts of a particular case, an inference of segregative intent should be drawn. The impact of the challenged official conduct is an important starting point. Other evidentiary sources available to the fact-finder include the historical background of that conduct, the specific events leading up to it, and the administrative record, particularly where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.

Alexander, 675 F.2d at 792. The district court in this case specifically considered the history of the enactment of the neighborhood plan and found an absence of segregative intent. *Dowell*, 677 F. Supp. at 1513. Reinforcing this finding is the district court's considered analysis of the documents and testimony concerning the enactment of the neighborhood plan.

Without question, this court's principal concern is "the emergence of thirty-two effectively one-race schools." Court's Opinion at 44. However, the statistic is inflated and other factors must be considered. *Spangler*, 611 F.2d at 1245 (Kennedy, J., concurring). To be sure, adoption of an elementary assignment plan in a former *de jure* system which (1) uses existing neighborhood boundaries which plainly were not drawn for maximum integration, and (2) results in 11 virtually one-race black schools with consequent rise of the system-wide black versus non-black dissimilarity index, from .24 to .39,[16] and an even more pronounced

statement containing an illogical conclusion." *Random House Dictionary of the English Language* 1317 (2d unabr. ed. 1987). Here, the conclusion propounded (an absence of segregative intent concerning enactment of the neighborhood plan) was based upon the premise that Dr. Taylor's education, experience and review of the evidence in this case would permit her to detect any racism inherent in the enactment of the plan. Dr. Taylor was offered as an expert witness "in social psychology and the study of race relations and racial attitudes." Rec. vol. VIII at 1216. The question was perfectly appropriate and her answer surprising given the context of her testimony.

[16] The dissimilarity index and the exposure index measure the degree of integration in a school system. *Dowell*, 677 F. Supp. at 1508. There is an inverse relationship between the degree of integration and the value of the dissimilarity index; the higher the dissimilarity index, the lower the degree of integration. Conversely, there is a direct relationship between the degree of integration and the exposure index; the higher the exposure index, the higher the degree of integration.

Before the Finger Plan was instituted, the dissimilarity index for the system in 1971 was .78; in 1984, it was .24; and with the introduction of neighborhood schools the index rose to .38 in 1985. The dissimilarity index does not represent "the ratio of blacks to non-blacks," Court's Opinion at 27, rather it is the number of students who would have to be reassigned so that each school would have the district-wide proportion of black student enrollment, divided by the number of students who would have to be reassigned if the district

rise in the elementary black versus non-black dissimilarity index from .24 to .57,[17] *Dowell*, 677 F. Supp. at 1508-09, creates a permissible inference of segregative intent. So too does the assignment of greater numbers

were completely segregated. F. Welch & A. Light, *New Evidence on School Desegregation* – U.S. Comm'n on Civil Rights Clearinghouse Pub. No. 92, 37 (1987) [hereinafter cited as *Welch & Light*]; def. exs. 44 & 45; rec. vol. II at 127-28. Below is a chart including the dissimilarity and exposure indices, together with other information about the school system.

Year	Enrollment	Percent Black	Dissimilarity Index	Exposure Index
1970	71,089	22.9	0.817	0.182
1971	68,840	23.4	0.780	0.222
1972	60,674	26.4	0.277	0.669
1973	54,196	26.7	0.255	0.677
1974	52,143	28.3	0.236	0.670
1975	50,162	29.7	0.246	0.651
1976	47,941	31.1	0.254	0.638
1977	46,274	32.3	0.270	0.619
1978	42,933	33.1	0.245	0.619
1979	42,471	34.8	0.267	0.594
1980	40,961	35.3	0.230	0.603
1981	40,777	35.5	0.233	0.596
1982	41,427	35.5	0.244	0.592
1983	40,513	36.7	0.234	0.584
1984	40,373	38.3	0.244	0.563
1985	40,174	38.6	0.377	0.464
1986	39,837	39.3	0.389	0.453

Def. ex. 45. The district court noted that th e Oklahoma City system experienced the eighth largest reduction in the dissimilarity index out of 125 school districts, prior to introduction of the neighborhood plan. *Dowell*, 677 F. Supp. at 1508; *Welch & Light* at 41; rec. vol. II at 131. The district court then relied upon a rank order comparison of dissimilarity index values for comparably sized central city school districts. *Dowell*, 677 F. Supp. at 1508-09; *see also* rec. vol. III at 193-94. It should be remembered that the dissimilarity index is a measure of racial balance, rec. vol. II at 129; vol. III at 269, and strict racial balance is not a constitutional requirement, *Swann*, 402 U.S. at 24-25. Also, Dr. Welch suggested a limitation in comparing districts for integration based on the dissimilarity index. Concerning his desegregation study for the United States Commission on Civil Rights, *Welch & Light* at 2-3, he said:

> We used the dissimilarity index primarily as a vehicle for examining school districts through time. Table 13 . . . as we have discussed, is one that simply takes some extreme districts and says, "which districts experienced the largest change . . . over the period of time?"
>
> But we're not trying, typically, in this study to compare one district and say, "This district is particularly well integrated while the other is not," so much as saying "what are the sources of change within districts?" and "what are the plan types that led to the sources of change?"

Rec. vol. II at 129-30; *accord Welch & Light* at 38 ("The fact that the dissimilarity index is useful in describing changes within a district does not imply that it is useful in comparing districts.").

[17] Before the Finger Plan was instituted, the dissimilarity index for the elementary system in 1971 was .83; in 1984, it was .24; and with the introduction of neighborhood schools the index rose to .56 in 1985. A chart including the elementary dissimilarity and exposure indices, together with other information concerning elementary schools, follows:

Year	Enrollment	Percent Black	Dissimilarity Index	Exposure Index
1970	40,205	23.5	0.888	0.106
1971	38,121	23.5	0.833	0.157
1972	23,744	22.8	0.191	0.737
1973	20,510	23.1	0.231	0.714
1974	19,711	23.0	0.219	0.731
1975	19,143	23.5	0.238	0.719
1976	18,793	24.9	0.237	0.705
1977	18,857	26.4	0.268	0.681
1978	18,115	28.0	0.228	0.675
1979	17,897	28.7	0.217	0.666
1980	17,119	29.6	0.190	0.667
1981	17,062	29.1	0.195	0.666
1982	17,457	28.7	0.203	0.671
1983	17,142	30.4	0.199	0.655
1984	17,285	32.4	0.240	0.622
1985	18,283	36.0	0.564	0.354
1986	18,399	36.6	0.565	0.352

Def. ex. 44

of black faculty/staff to schools with predominantly black enrollments. The district court clearly was aware of these factors and "sharply focused on the racial composition of the predominantly black schools which came into being as a result of the neighborhood

plan," *Dowell*, 677 F. Supp. at 1517, as well as the faculty/staff imbalance. *Id.* at 1518-19. Although the facts in this case might logically support a judgment for either side, our task is not to decide the case anew. *Alexander*, 675 F.2d at 801.

VI.

Relevant factors led the district court to conclude that there was an absence of segregative intent on the part of the school board and that the system remained unitary. A neighborhood school policy is not, in and of itself, violative of the fourteenth amendment. *Crawford v. Board of Educ.*, 458 U.S. 527, 537 n.15 (1982). Just as equal educational opportunity is a national policy, so too is neighborhood schooling. 20 U.S.C. § 1701.

A.

The impetus for the neighborhood plan at the elementary level was the board's determination that the 1972 Finger Plan, as modified over the years, was structurally inadequate to meet the educational and equitable objectives of the district in grades 1-5. As enacted and revised, the neighborhood plan had several objectives, including 1) maintaining a unitary system, 2) establishing K-4 schools in the northeast section where none existed, 3) maintaining K-4 neighborhood schools with stability, 4) increasing pride and parental involvement in the elementary schools, and 5) continuing an integrated school district in an urban setting. Pl. hearing ex. 1 (Def. ex. 96, *see* rec. vol. I, doc. 17, app. D at 12, 29), § 1 at 2 (1985-86 student assignment plan). The school board expected the following advantages: 1) neighborhood schools, 2) fifth-year centers in all areas, not just the northeast quadrant, 3) reduction of busing, 4) program improvement, including increased participation in extracurricular activities, 5) increased parental participation, and 6) increased community involvement and support. *Id.*; rec. vol. III

at 347. Obviously, the neighborhood assignment plan meets certain of these objectives better than others. It is decidedly ineffective in promoting integration in some schools given the 11 90%+ black schools.

In the simplest analysis, the school board appears to have elevated the educational value of student assignment based on proximity over the social value of mandatory integration in grades 1-4.[18] The school board viewed the advantages of neighborhood schooling as outweighing the negative effect that this program has on the racial balance in some elementary schools. From a personal perspective, we may regard this to be a regrettable choice;[19] however, once a *de*

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[18] Kindergarten students under the 1972 Finger Plan were permitted to attend schools of choice. Pl ex. 6, *reproduced in* Appellants' Addendum to Brief at 19. Dr. Foster's proposed desegregation plans did not include kindergarten students in reassignments. Pl. ex. 57 at 1. Thus, it would appear that plaintiffs do not object to the present 5 one-race black, and 6 virtually one-race black, kindergartens at 11 schools. For example, in 1986-87, the 11 virtually one-race black K-4 elementary schools had the following kindergarten enrollments:

School	Black	Other	Total	% Black
Creston Hills	44	1	45	97.8
Dewey	59	0	59	100.0
Edwards	61	1	62	98.4
Garden Oaks	34	0	34	100.0
King	67	2	69	97.1
Lincoln	68	0	68	100.0
Longfellow	48	0	48	100.0
North Highland	72	2	74	97.3
Parker	57	2	59	96.6
Polk	58	2	60	96.7
Truman	76	0	76	100.0

Pl. ex 27, *reproduced in* Appellants' Addendum to Brief at 187-88.

[19] As indicated by Dr. Biscoe, rec. vol. III at 326, there is very mixed empirical evidence concerning the benefits of an integrated education in terms of enhanced student achievement and improved interracial attitudes and relations. *See* 3 D. Levine, Desegregation in Schools, *International Encyclopedia of Education* 1368-71 (T. Husen & T. Postlethwaite 2d ed. 1985).

jure school system and its vestiges are eliminated, the Constitution empowers local authorities to make such choices in the absence of segregative purpose.[20] In the factually similar *Riddick* case, 784 F.2d at 521, the Fourth Circuit upheld a unitary school district's neighborhood plan where 40% of the minority students attended ten 90%+ minority schools. *Id.* at 527 n.7 (40% derived from data presented in footnote 7). Moreover, even in the remedial phase, which we are long past, a court may not order strict racial balancing or quotas. *Swann*, 402 U.S. at 23-24.

B.

As acknowledged by both sides and found by the trial court, there were inequities associated with the

Plaintiffs' expert Dr. Crain testified that segregated schools inhibit learning, but acknowledged that the studies conflicted concerning the effects of desegregation on achievement. Rec. vol. III at 971-72. Defendants' expert Dr. Walberg testified, based on a variety of studies "that racial composition of the school is irrelevant to how much children learn in school, and no particular racial composition, such as zero, ten, fifty, ninety, or a hundred makes important differences for how much children learn in school." Rec. vol. VI at 913-14. He indicated that parental involvement and what he termed the "curriculum of the home" is important for academic achievement. *Id.* at 916. Defendants' expert Dr. Sampson testified that certain home values, such as consistent parental authority, parent-child interaction, and monitoring and reinforcement of children by parents, rather than race or economic status, determine academic achievement. Rec. vol. IX at 1455, 1458. Dr. Sampson testified that "if the purpose of the schools is education," and if an effective schools program was in place, he would not be concerned with 90%+ black schools. *Id.* at 1461.

Dr. Sampson relied in part upon his research concerning 6 all-black parochial schools located in very poor black communities. Rec. vol. IX at 1456. Only about half the students are Catholic. *Id.* at 1457. Dr. Sampson looked at why these schools were so successful and concluded that they have characteristics associated with effective schools and the children are motivated at home. *Id.* at 1457-58. This district stresses effective schools concepts and greater parental involvement in an effort to improve educational outcome. In my view, the district court could consider this evidence as indicative of a lack of segregative intent. *See Dowell*, 677 F. Supp. at 1524. This court disagrees. See Court's Opinion at 48-49 n.51.

[20] "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." *The Federalist No. 78*, at 507-08 (A. Hamilton) (Mod. Lib. ed.) (emphasis in original). An inherent limitation of judicial intervention in the educational process is the lack of judicial accountability for the results.

"stand-alone" feature. *Dowell*, 677 F. Supp. at 1514. These inequities were revisited when the school board voted 4-3 to make Bodine a stand-alone school. Analyzing the events which led up to the neighborhood plan for extreme and unexpected hardship to the school board, Court's Opinion at 32, this court concludes that the "stand-alone feature . . . . emerged from the evidence as a matter of speculation tied to capacity problems, budget constraints, and local politics." *Id.* at 35; *see also id.* at 34. This implies that the neighborhood plan was motivated by concerns that were not bona fide.

As of 1983-84, there were three K-4 stand-alone schools, Harrison, Edgemere and Western Village, with Rockwood joining the list as of 1984-85. Def. ex. 76, *reproduced in* Appellants' Addendum to Brief at 332, 345. At the same time there were two K-5 stand-alones: Arcadia, because of location and Horace Mann, because of racial balance. *Id.* at 347. The board then voted to make Bodine a K-5 stand-alone school. *Id.* at 351.

Initially, the stand-alone provision in the Finger Plan was to operate when the black student percentage in a neighborhood attendance zone exceeded 10%, but was less than 35%. Pl. ex. 6, *reproduced in* Appellants' Addendum to Brief at 20. In the 1972-73 school year, there were 11 stand-alone schools, not all of which met the above criteria.[21] Pl. ex. 13, *reproduced*

[21] The original stand-alone schools, together with the percentage of black enrollment, were: 1) Arcadia, 68.4% (geographically isolated), 2) Columbus, 19.0%; 3) Edgemere, 20.3%, 4) Horace Mann, 21.6%, 5) Mark Twain, 26.6%, 6) Nichols Hills, 31.2%, 7) North Highland, 50.0%, 8) Riverside, 15.2%, 9) Ross, 27.7%, 10) Shidler, 44.8%, and 11) Stand Watie 26.7%. Pl. ex. 13, *reproduced in* Appellants' Addendum to Brief at 98. Four (Columbus, Ross, Shidler, Stand Watie) were located south of the Canadian River. Four (Edgemere, Horace Mann, Mark Twain, Riverside) were located north of the river in the central portion of the area, and three (Arcadia, Nichols Hills and North Highland) were located in the far northern portion of the area. *See* Pl. ex 3; Pl. ex. 17, *reproduced in* Appellants' Addendum to Brief at 51.

in Appellants' Addendum to Brief at 98. The criteria changed over the years, but the concept was retained. The school's planning department determined initial eligibility for K-4 and K-5 stand-along status based on whether the black student percentage of the neighborhood attendance area would result in a school which was plus or minus (±) 10% or ±15% (depending upon school size) of the district average of black students for the particular grade configuration, i.e. K-4 or K-5. *See* def. ex. 72, *reproduced in* Appellants' Addendum to Brief at 275-76. Thus, as of April 1984, the planning department identified 11 schools which were eligible for K-4 stand-alone status. All but one of these schools were eligible, in the alternative, for K-5 stand-alone status in addition to 3 other schools, bringing the total number of schools eligible for K-5 stand-alone status to 13.[22] *Id.* at 276; *accord* rec. vol. IV at 427. The planning department then identified 9 schools to be considered as potential K-5 stand-alone sites. *See* def. ex. 72, *reproduced in* Appellants' Addendum to Brief at 275.

Dr. Welch also considered the geographic pattern of schools eligible for stand-alone status solely on the basis of whether the racial composition of an elementary attendance area was ±15% of the system-wide black average of 35%. Rec. vol. III at 216-218. He noted

[22] These schools eligible for K-5 stand-alone status for 1984-85 were Arcadia, Bodine, Britton, Edgemere, Eugene Field, Gatewood, Horace Mann, Putnam Heights, Rockwood, Telstar, Western Village, Willow Brook and Wilson. Def. ex. 72, *reproduced in* Appellants' Addendum to Brief at 276. Two (Bodine (SE), Rockwood (SW)) were located south of the Canadian River; two (Telstar (NE) and Willow Brook (NE)) were located south of the river, but in the northeast Star-Spencer area of the district; six (Edgemere, Eugene Field, Gatewood, Horace Mann, Putnam Heights, Wilson) were located north of the river adjacent to the northeast quadrant; three (Arcadia (NE), Britton (NW) and which included the Nichols Hills and Lone Star attendance areas, Western Village (NW)) were north of the river and in the far northern portion of the main geographic area. *See* Pl. ex. 3; Pl. ex. 7, *reproduced in* Appellants' Addendum to Brief at 51. Thus, although these 13 schools were located throughout the district, the majority of the schools formed a band more or less in the middle of the district.

that the location of these schools supported the contention that there had been diffusion of the black population from the northeast quadrant.

The district court correctly noted that three expert witnesses in the case acknowledged that the 1972 Finger Plan, including the stand-alone feature, was now inequitable because of demographic change. *Dowell*, 677 F. Supp. at 1514. Defendants' expert Dr. Welch testified that "it's just not a plan that was designed to withstand the kind of demographic change that occurred in this district." Rec. vol. III at 220. Quite apart from Dr. Welch's projections indicating that more schools would be eligible for stand-alone status by 1995,[23] he testified that there are inherent limita-

[23] This court apparently finds the district court's factual findings concerning the projected number of stand-alone schools and demographic change clearly erroneous, partly because the statistical forecasts developed by defendants' expert Dr. Welch indicated that some school attendance areas, which are predominantly black, may decline from 100% black in 1986 to 93.2% black in 1995 (a drop of 6.8%) or from 93.2% black in 1986 to 89.6% black in 1995 (a drop of 2.7%). *See* Court's Opinion at 9, 28, 28 n.31, 35; def. ex. 11 at 2.

The court contends that Dr. Welch's 1995 projections should be rejected as clearly erroneous because Dr. Welch gave testimony "directly controverting that of Dr. Clark." Court's Opinion at 28. Dr. Clark testified that "there's a very, very small proportion of white households that will move into neighborhoods that are heavily minority," and that concentrated minority residential areas are unlikely to change. Rec. vol. II at 105-06. The court also appears concerned with the statistical methodology used by Dr. Welch. Court's Opinion at 28-29. When the testimony is unraveled, it is apparent that Dr. Welch's testimony is a sufficient basis for the district court's findings; this court is merely reweighing the evidence.

Dr. Welch used a three step procedure to forecast the percent black in each attendance area: 1) time series regression to forecast the district-wide black student percentage, 2) time series regression to forecast the total number of students in each attendance area, and 3) a complicated procedure to allocate the black students to particular areas based upon the distribution of blacks in the particular attendance areas and adjacent areas. Rec. vol. III at 236, 242-43, 249.

Concerning the second step, Dr. Welch used two models, one linear and the other exponential, to predict enrollment within the attendance areas. *Id.* at 238-39. This was done so as to most accurately extrapolate current enrollment trends. For example, if enrollment had dropped during the most recent seven years, Dr. Welch selected the model that would project a continuing drop. *Id.* at 241; *see also id.* at 245. Dr. Welch testified that demographers routinely do this in making predictions — "[p]eople who are doing forecasting

tions to the plan: 1) it was designed for an elementary student population that was 20%, not 40% black, 2) as more schools qualify for stand-alone status, busing distances for those still bused will be longer, and 3)

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use a variety of models." *Id.* at 241.

Concerning the third step, plaintiffs' counsel, Mr. Chachkin, asked why Dr. Welch did not use trend regression to forecast the *percentage* of blacks in each attendance area based upon the past percentage of blacks relative to total enrollment. The question comes down to why Dr. Welch "used a *ratio* rather than a *percentage*" in his third step. *Id.* at 249 (emphasis added). Dr. Welch responded that there were two reasons why he did not proceed in the third step as plaintiffs' counsel suggested: 1) the results would not have been consistent, and 2) such an approach "would not have added to reasonable behavior at a district-wide level." *Id.* at 243. It was in response to this question that Dr. Welch testified that he wanted an internally consistent forecast because someone would be cross-examining him. *See* Court's Opinion at 28 (quoting rec. vol. III at 244).

This court has blended the points brought out in cross-examination (concerning the second and third steps of the statistical model) and given a somewhat misleading picture. *Id.* The court says:

> Noting that he used two different methods for calculating the 1974 to 1986 figures and the 1986 to 1995 figures, Dr. Welch conceded: "And I really didn't want an inconsistent forecast. I thought someone would be cross-examining me. And so I designed the procedure to be completely internally consistent."

Id. at 28. In my view, Dr. Welch should not be faulted for using those procedures which are likely to result in more accurate forecasts. Rec. vol. III at 246.

Dr. Welch was hardly evasive concerning the limitations of historical forecasting which is used routinely: "There is literally no scientific basis for assuming that the world regenerates itself." *Id.* at 241. He admitted that, given more time, he could generate measures of reliability and improve the procedure. *Id.* at 246. In sum, he said:

> Dr. Welch: "How wide are the intervals?" I can't guess, but I think, it would be appropriate to call these numbers guesstimates, that I think they're straight-faced, they come from a serious procedure that's applied conscientiously, there's no result in terms of configuration that I'm working to. I'm trying to describe the data. I think I've done that.
>
> . . .
>
> But you certainly don't want to look at a number like . . . . 193 [the projected black percentage for Lee elementary in 1995, Def. ex. 11 at 2] and see the "3," and when you see the "9," you probably want to say .15 to .25. That's — I mean, they're an indication."

Id. Thus, the point estimates he generated for predominantly black schools are within a range of accuracy. When questioned by Mr. Chachkin about this Dr. Welch explained that regression estimators characteristically fail to predict extremes. *Id.* at 254.

schools housing fifth-year centers will be forced to close if enrollment declines due to fifth grade students attending stand-alone schools. *Id.* at 219-20, 225-226. Add to that, the plan does not consider the presence of other minority groups. Rec. vol. III at 312-22 (Dr. Biscoe). Dr. Welch's forecasts for 1995 indicated that more schools would qualify for stand-alone status. *Id.* at 224; *see supra* note 23.

School board member Dr. Clyde Muse was troubled by the implications of an increasing number of schools eligible for stand-alone status. Rec. vol. IV at 424-428. He believed that because of the central location of many of the potential stand-alone schools, busing distances for some students would increase and the closing of some fifth-year centers in the northeastern part of the district became a real possibility. *Id.* at 425-26. Plaintiffs' expert Dr. Foster agreed with Dr. Muse concerning the disproportionate impact of stand-alone schools. Rec. vol. VIII at 1266-67. Dr. Muse described the fifth year centers as "the only elementary schools in the black community." *Id.* He recognized that the "stand-alone" feature of the plan had to be eliminated because the board would always be pressured to create stand-alone neighborhood schools in qualifying neighborhoods, perhaps at the expense of the non-stand-alone components of the elementary system. *Id.* Board member Hill put it this way: "Our patrons, our communities, had been told since '72 that, if they became integrated, they could have a neighborhood school, and they could not understand why they had followed exactly what the court said and the board was not giving them their K-5 schools." Rec. vol. IV at 528. The comments of Dr. Muse and Mrs. Hill also

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With the above in mind, the district court was hardly required to reject Dr. Welch's forecasting and its implications merely because the forecasting indicated that some attendance areas may be 93.2% black when it is more likely that they will be 100% black. To require absolute accuracy in forecasting is an impossibility. Moreover, the forecast is certainly consistent with the present racial composition of those neighborhoods. This court's problems with the statistical forecasting go to the weight it should be accorded, not its sufficiency.

are corroborated by the minutes of the school board meeting concerning K-5 stand-alone status for Bodine. *See* Def. ex. 76, *reproduced in* Appellants' Addendum to Brief at 348-51 (summary of hearings between interested persons and board members concerning stand-alone status for Bodine).

Another inequitable feature of the 1972 Finger Plan as implemented over the years was that black students were bused during the first four years to schools outside black residential areas, while white students were not bused until the fifth year. *See* rec. vol. VIII at 1265 (Dr. Foster). Of course, a desegregation plan may "not unfairly burden minority students." *Keyes v. School Dist. No. 1*, 521 F.2d 465, 479 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); *Higgins*, 508 F.2d at 793. Both sides are in agreement that this feature of the 1972 plan required modification.

C.

As designed and implemented, the neighborhood plan *continued* the majority-to-minority transfer option under existing Policy JCA-M. Pl. hearing ex. 1, § 1 at 4. Free transportation was provided for elementary students exercising the option. *Dowell*, 677 F. Supp. at 1523. The district court viewed this option as one attribute of a unitary system. The district court said: "In a word, parents in Oklahoma City today have a choice. No pupil of a racial minority is excluded from any school in Oklahoma City on account of race." *Id.* In a statement too sweeping, this court then says that "[t]he record does not support this assertion." Court's Opinion at 40. Does the court mean that parents do not have a choice or that minority students are being excluded from schools in the district, or both? The discussion that follows concerns the majority-to-minority transfer option and perhaps the court is questioning only the transfer option. If this court is saying that the efficacy of the transfer option is not supported by the record, that is one thing. But it is quite another

to claim that the evidence does not support an absence of the purposeful racial discrimination inherent in *excluding* a student from a public school on the basis of race. The record most certainly and repeatedly supports the contention that students are *not* excluded from the public schools on the basis of race; there has been compliance with *Brown I* and the district is *not* operating a dual system of assignment at any level.

The majority-to-minority transfer option has been described "as a useful part of every desegregation plan." *Swann*, 402 U.S. at 26. In a school district charged with an affirmative duty to desegregate, the purpose of the option is remedial. *Id.* Here, the district court recognized that retention of the option was indicative of the board's legitimate, not discriminatory, motivation in enacting the neighborhood plan. The operation of the option is not indicative of segregative intent.

This court views the district as under an affirmative duty to desegregate and is concerned that parents do not understand the option and will not "freely" exercise it. Court's Opinion at 41. The option is not new, parents were provided with a letter explaining the option, rec. vol. III at 310, 327, and I submit that the court's real concern is that a voluntary option cannot result in racially balanced schools. Obviously, if only 332 students transferred under the option in 1985-86, and 181 transferred in 1986-87, *Dowell*, 677 F. Supp. at 1523, the option will not achieve racial balance. The court's real complaint is the paternalistic notion that black parents will not choose the option.[24] *Contra* P.

[24] Plaintiff's expert Dr. Crain testified, concerning the majority-to-minority transfer option, that "it would be astonishing to expect very many blacks to volunteer for the frightening experience of sending their children across town to an all-white school." Rec. vol. VII at 1011. He indicated that only "a tiny percentage" would choose the option. *Id.* Plaintiffs' expert Dr. Foster testified that "the children who need desegregated

Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal* 86 Colum. L. Rev. 728, 756-77 (1986) (cited in Court's Opinion at 21 n.18; arguing that choice to attend predominantly minority school is tainted).

D.

. The district court also considered the laudable goal of increased parental and community involvement brought about by the neighborhood plan. *Dowell*, 677 F. Supp. at 1516-17. Apparently, the court views this evidence as an attempt to compensate for the lack of a unitary school system. *See* Court's Opinion at 44. Such is not the case. Instead, the evidence reinforces the lack of discriminatory intent in the enactment and implementation of the neighborhood plan. It also corroborates the testimony from school officials that increased parental involvement was a partial motivation for the plan. The court acknowledges that there was a "substantial increase in parent participation," Court's Opinion at 44 n.47, yet questions the "conflicting evidence" the district court relied upon in finding a causal link between instituting the neighborhood plan and increased parental participation. *Id.*

Despite this court's objection on hearsay grounds to Dr. Mason's testimony concerning parental involvement, *id.*, witness after witness testified based upon personal knowledge that the increased participation of parents was due to the neighborhood plan. [25] [26]

schools . . . the most[] may be the least likely to take that option." Rec. vol. VIII at 1196.

When cross examined by plaintiffs' counsel Mr. Shaw, a member of the school board, Mrs. Hermes, indicated that the district would honor the majority-to-minority transfer program even if every black parent exercised the option. Rec. vol. III at 369.

[25] *See* rec. vol. III at 339 (Dr. Biscoe indicated that "[a]ll of the data that we currently have indicates that parent involvement has increased significantly" under the operation of the plan.); *id.* at 350, 354 (Board member Hermes (1980-present) testified that PTA units increased from 15 to nearly 50 with the enactment of the plan; opportunity to participate in extracurricular activities is greater under plan); vol. IV at 429, 435 (Board member Dr. Muse (1982-86) testified that *the plan* increased community involvement and support, which

Conversely, several witnesses indicated that busing had an adverse effect on parental involvement.[27]

Defendants' expert Dr. Lane testified that an effective schools program,[27] is enhanced by a neighbor-

was one of the purposes of enacting it); *id.* at 516-20, 26 (Board president Mrs. Hill (1976 to present) testified about unsuccessful attempts to increase elementary parent involvement before implementation of neighborhood plan; school board sought to increase parental involvement); vol. V at 629-30 (Mr. Owens, a black parent in the northeast quadrant supported neighborhood plan; noted increased parental involvement with plan); *id.* at 639-43, 650-51 (Dr. White, a black parent, favored neighborhood plan because increased parental involvement expected; Dr. White formed coalition and collected 400 signatures in northeast quadrant in favor of plan); *id.* at 736-37 (Dr. Steller, school superintendent, testified that with the return of neighborhood schools parents were much more willing to participate in PTA, parent conferences and open houses); *id.* at 775-76 (Karen Leveridge, former local, state and national officer in PTA, testified that implementation of the neighborhood plan was one of the major reasons responsible for increased PTA participation); *id.* at 790-91 (Odette Scobey, principal of Truman Elementary with 27 years service, testified that parents have become more involved in helping in the classroom and attending parent conferences since the neighborhood plan was implemented); rec vol. VI at 853-55 (Robert Brown, principal of Martin Luther King Elementary, testified that parental involvement and support has increased since the enactment of the neighborhood plan); *id.* at 863 (Billie Oldham, district-wide PTA council president who organized new PTA units testified that she saw a great increase in parental involvement with the neighborhood plan); *contra* rec. vol. IX at 1413-14 (Clara Luper, high school teacher and NAACP Youth Adviser, testified that only 8 parents attended the Longfellow PTA meeting when she was a guest and that Harrison Elementary had "a very effective PTA," but that it was "mixed in with school activities."); *id.* at 1434 (Senator Porter, NAACP President, hearsay concerning effective functioning of PTA's under 1972 plan).

[26] Many black parents and school personnel supported the neighborhood plan. *See supra* note 25. Mrs. Luper, who opposed the plan, was asked about the "various positions" taken in the black community concerning the neighborhood plan at which time she questioned the motives of black school personnel, *see Dowell*, 677 F. Supp. at 1519, who supported the neighborhood plan:

> Mr. Shaw: What is your understanding concerning those positions?
> Mrs. Luper: Once again, those positions are based on who you're talking to. Throughout history, we have had people that have always been able . . . to protect their own interests.
> I noticed with a great deal of interest the employees of the board of education that were — that have testified here, but I have also noticed that those employees have never been involved in anything in this city to change conditions of black people. Now, I've noticed that, and that's really important.

hood schools program because "a neighborhood school program can insure greater parental involvement, and one of the hallmarks of an effective school is parental involvement . . . . Proximity means easy access, and that's very good, and the neighborhood school does help that." Rec. vol. VI at 897. Dr. Walberg indicated that the neighborhood reassignment plan, with its emphasis upon interaction between students, teachers and parents, contributed to the educational

Rec. vol. IX at 1415. Mrs. Luper's statement does not allow for an honest difference of opinion among blacks on the issue of the neighborhood assignment plan.

[27] In discussing the disadvantages of the proposed Foster Plan, the district court summarized its objections and mentioned cross-town busing and "the potential harms related to busing students at this tender age." *Dowell*, 677 F. Supp. at 1526. Indeed, student transportation is a significant factor in the Foster Plan. Dr. Foster estimated that 85 buses would be needed to transport 4,000 elementary students at an initial cost of $3,500,000 and a recurring cost of $982,712. Rec. vol. VIII at 1312-13. Dr. Steller disagreed with these figures, finding that 125 buses would be needed. The district court apparently agreed with Dr. Steller, finding that the total cost of Dr. Foster's plan (including the significant element of transportation) would be approximately $7.4 million the first year and $1.7 million thereafter. *Dowell*, 677 F. Supp. at 1525; rec. vol. IX at 1500.

This court paid close attention to the testimony concerning busing and implies that the desirability of busing elementary students to achieve racial balance probably ought not to be questioned yet. Court's Opinion at 30-31. Of course, in a system charged with an affirmative duty to desegregate, the Supreme Court has made it clear that busing may be an appropriate tool to liquidate a dual system and that objections to transportation will be countenanced only "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann*, 402 U.S. at 30-31. Limitations on time and travel are a function of student age. *Id.* at 31. Without question, elementary students including four- and five-year-olds may be bused reasonable distances in order to dismantle a dual system. *Swann*, 402 U.S. at 29 n.11.

In a unitary system, however, the desirability of busing elementary 1-4 students may be questioned. Quite apart from the fact that the cost of additional transportation will divert funds from the district's educational mission and necessitate reductions in current programs, rec. vol. IX at 1502-05, Dr. Steller predicted that parental involvement would plummet. *Id.* at 1482-84.

[28] "The most important characteristics of effective schools are strong instructional leadership, a safe and orderly climate, school-wide emphasis on basic skills, high teacher expectations for student achievement, and continuous assessment of pupil progress." U.S. Dep't of Education, *What Works — Research About Teaching and Learning* 45 (1986). Dr. Hughes testified that effective schools techniques are being implemented successfully in the Oklahoma City elementary schools. Rec. vol. V at 685-88.

mission of the district. *See* rec. vol. VI at 918-22, 934. He termed it "the next logical step to improve the education of the children in the Oklahoma City Public Schools." *Id.* at 953. Dr. Steller testified that parental involvement enhances academic achievement. Rec. vol. V at 736; *accord id.* at 796 (testimony of Ms. Scobey); *see also Riddick*, 784 F.2d at 541.

E.

This court's approach to the school board's evidence is to judge it against an improper legal standard given the unitary status of the school district. This court then compounds the problem by searching the record for conflicting evidence and holding the school board to an impossible standard of proof which does not allow the school board to prevail if there is any conflicting evidence. This practice is directly contrary to the standard by which we carry out our appellate function. *Anderson*, 470 U.S. at 573-576 ("This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court."). Moreover, this court's appellate factfinding is not free from error.

Consider the conflicting trial evidence on academic achievement. This court addresses such information, Court's Opinion at 41-42, and in the context of the district's continued unitary status, comments that "there is no evidence of specific educational programs designed for those racially identifiable elementary schools to counteract the effect of low achievement in these schools." *Id.* at 42. In its revised opinion, this court then criticizes the dissent for "wad[ing] into this area." Court's Opinion at 48-49 n.51.

The district court rejected the notion that schools must be racially balanced for maximum academic

achievement. *Dowell*, 677 F. Supp. at 1523-24. In so deciding, the district court relied upon several evidentiary sources, including the school board's information indicating that the gap between black and white third graders was reduced 13% between 1985-86 and 1986-87, after introduction of the neighborhood schools program. *Id.* at 1524. While the comparison may be difficult to generalize, it is not because the test comparisons are "flawed" because "[t]he group of students studied one year is not the same studied the next year." Court's Opinion at 41-42. Dr. Steller indicated that an acceptable comparison could be made even if the students were not the same; that comparison of the same grade level is an accepted technique. Rec. vol. V at 744. Indeed, different groups of third-graders over time are implicit in the comparison. Indeed, even plaintiffs' expert Dr. Crain testified that an alternative to comparing the same group of cohorts over time is to compare different cohorts at particular grade levels. Rec. vol. VII at 1003. The district court could consider this comparison without committing clear error.

The district court also could rely upon the information that 8 of 10 neighborhood elementary schools with 90%+ black enrollments had achievement test gains which surpassed the national average for black students. *Dowell*, 677 F. Supp. at 1524. This court's observation that "gain is an elusive concept," Court's Opinion at 42 n.44, goes to the weight of this evidence; it does not render the district court's finding that the neighborhood plan is one factor which may enhance academic achievement at some schools clearly erroneous. *See* rec. vol. VI at 933-34, 946-47 (Dr. Walberg testified that neighborhood school plan, effective schools program and increased parental involvement are major causes of improvement and only slight drops at other 2 schools).

Though gain may be an elusive concept, the court does tell us that scores at 2 schools dropped. *Id.* at 42.

Does this mean that gain does not inure to the benefit of the defendants because it is elusive, but loss does? The court is merely reweighing conflicting evidence to produce different outcome. However, the court's efforts notwithstanding, the district court's ultimate finding that academic achievement will not be harmed if schools are not racially balanced is not clearly erroneous.

In the same vein, the court dismisses the effective schools program by telling us that it "is geared to the upper grades." Court's Opinion at 42. Not so. As support, this court cites Dr. Crain's testimony. *Id.* (citing Rec. vol. VII at 1004-05). Dr. Crain admitted that there was "not very strong evidence that Oklahoma City is following the national trend in which segregation is harmful to achievement." Rec. vol. VII at 1004. He attributed this to the recency of the neighborhood plan and then said that "[t]he best I can say is that certainly the new effective schools program that I've read some literature about is working in the upper grades better than it is the lower grades." *Id.* at 1004-05. Dr. Crain's *reading* about an effective schools program somewhere hardly supports the proposition that *this* program in *this* district is geared to the upper grades. To the contrary, the effective schools program appears to have been successfully implemented in the elementary grades at issue. Rec. vol. V at 685-688 (Dr. Hughes); 702-03 (Dr. Steller); vol. VI at 880-81 (Dr. Lane).

Likewise, this court tells us that the effective schools program is "tied to budgetary constraints experienced by the District." Court's Opinion at 42. For this proposition, the court cites Dr. Lane's testimony where he was asked how Oklahoma City compares to other districts "in implementing an effective schools program and in carrying out their instructional philosophy." Rec. vol. VI at 881. Dr. Lane replied that the district compared favorably. *Id.* He said: "I have found that this district, laboring under tremendous fiscal

constraints, has made giant strides." *Id.* Such a statement hardly links the effective schools program to the district's fiscal constraints. Likewise, the court is concerned with the absence of specific programs designed for the racially identifiable elementary schools. Court's Opinion at 42. However, Dr. Hughes testified that one of the major purposes of the effective schools program is to narrow the differences in achievement based upon socioeconomic and racial differences. *See* rec. vol. V at 688. Indeed, under the proposed Foster Plan B, 24% *fewer* low income students (710) will be eligible for federally funded remedial math and reading help given the program requirements. Rec. vol. IX at 1496 (Dr. Steller).

The district court's finding concerning increased parental involvement caused by the neighborhood plan, *Dowell*, 677 F. Supp. at 1516-17, and the efforts of the district to provide improved educational opportunity for all, *id.* at 1522-24, are not clearly erroneous. These findings, along with others, support the ultimate factual finding of continued unitary status.

VII.

Regarding faculty/staff assignment, this court says that the district court "did not address plaintiffs' exhibits 48, 50, 52 and 54[,]" which show, to use the court's oxymoron, "the growing parity of imbalance" between faculty and students. Court's Opinion at 39. This court relied on plaintiffs' exhibit 54, prepared by plaintiffs' counsel, rec. vol. VIII at 1270, and introduced through Dr. Foster, which tends to show that schools with higher black enrollments have more

black teachers.[27] Without question, the district court was aware of this phenomenon, *see Dowell*, 677 F. Supp. at 1518, but it declined to infer segregative intent. After the district enacted the neighborhood

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[29]

Elementary Schools' Enrollment and Faculty Racial Composition (ranked by % Black Faculty) 1986-87

Elementary School	Black Teachers	Total Teachers	% Black Teachers	% Black Students
Edwards	5.9	8.4	70	99.5
Telstar	9.0	13.8	65	59.7
Lincoln	8.1	12.6	64	99.3
Garden Oaks	4.5	9.0	50	98.3
Polk	6.0	13.0	46	98.8
Parker	7.5	16.3	46	96.9
Truman	7.5	17.0	44	99.7
King	5.9	13.6	43	98.9
Creston Hills	4.0	9.4	43	99.0
Dewey	4.0	9.5	42	98.4
Willow Brook	6.8	16.3	42	51.5
Hawthorne	5.8	14.3	41	19.2
Edgemere	5.8	14.8	39	51.3
Longfellow	4.6	12.1	38	99.1
Westwood	4.0	10.5	38	20.0
Harrison	3.0	7.9	38	49.4
North Highland	5.6	14.6	38	97.5
Rockwood	7.0	19.5	36	41.5
Shidler	4.6	13.1	35	37.1
Mark Twain	2.2	6.2	35	9.7
Horace Mann	3.0	9.0	33	35.2
Putnam Heights	4.0	12.7	31	34.8
Kaiser	2.5	8.0	31	18.1
Star	5.0	16.0	31	61.4
Shields Heights	5.0	16.5	30	3.9
Quail Creek	3.0	10.0	30	13.1
Spencer	5.0	16.6	30	76.3
Heronville	4.0	13.6	29	8.9
Ridgeview	3.6	12.6	29	17.1
Hayes	4.5	15.5	29	11.2
Monroe	4.5	16.5	27	15.9
Gatewood	3.0	11.3	27	25.7
Columbus	4.8	17.8	27	15.2

plan, it became necessary to reassign 500 teachers. Rec. vol. IV at 548. In a negotiated agreement with the teachers' union, teachers were allowed to indicate preferences as to assignment, with senior faculty receiving first preference. *Id.* at 1518. The executive director of personnel testified that reten-

Elementary School	Black Teachers	Total Teachers	% Black Teachers	% Black Students
Wheeler	3.6	13.1	27	8.1
Oakridge	3.2	12.1	26	42.3
Fillmore	3.0	12.1	25	6.4
Stonegate	5.0	20.5	24	33.1
Sequoyah	3.2	13.1	24	19.5
Britton	3.0	12.6	24	37.9
Bodine	5.5	24.0	23	34.2
Western Village	2.8	12.3	23	65.6
Southern Hills	2.0	8.9	22	7.0
Lafayette	2.0	8.9	22	2.7
Van Buren	2.0	9.0	22	7.7
Willard	1.2	5.7	21	9.1
Parmelee	3.0	14.6	21	11.8
Wilson	2.0	9.5	21	26.4
Arcadia	1.0	5.1	20	28.5
Stand Watie	3.0	16.0	19	25.9
Lee	3.5	19.0	18	6.6
Hillcrest	2.0	11.4	18	11.6
Coolidge	3.0	17.0	18	5.1
West Nichols Hills	2.0	11.5	17	20.0
Eugene Field	4.0	23.3	17	31.8
Prairie Queen	3.0	17.5	17	6.2
Madison	1.0	6.0	17	15.0
Davis	1.2	7.2	17	9.9
Johnson	2.0	13.1	15	27.4
Arthur	2.0	13.6	15	7.3
Adams	2.0	14.8	14	6.1
Buchanan	1.0	10.1	10	8.8
Pierce	1.0	10.1	10	16.3
Linwood	1.0	10.1	10	13.6
Rancho Village	0	10.2	0	10.6
Total	237.9	820.4		

Fifth-grade centers omitted because of non-comparable grade structure of Hoover. Chart compiled from pl. ex. 54 with additional detail from pl. ex. 29.

tion of qualified faculty was a motivating concern for the choice provision. Rec. vol. IV at 546, 548. He acknowledged that this caused some racial imbalance and there was a desire to make sure that this assignment process was not repeated. *Id.* at 555.

The response of the school district to this situation is relevant to understanding the district court's finding of no segregative intent. This court states: "Although the executive director of personnel testified that especially after 1985, the teacher assignments would comply with the district affirmative action goal of 36.9% with a 10% variance factor [±10%], the numbers belie the aspiration." Court's Opinion at 39-40 (footnote omitted). The personnel director, Vern Moore, actually testified that there would be compliance in almost all of the elementary schools by August 1987. Rec. vol. IV at 557; *see also* def. ex. 199 (tracking status of compliance at schools as of June 1987). His testimony did not indicate that earlier balance was expected. The court's statement makes it appear that since 1985 the district has ignored the situation. Not so. Moreover, this court is of the view that specific evidence of a change is lacking. Court's Opinion at 40.

Mr. Moore testified that as of April 1987, building administrators were given direct responsibility for compliance with affirmative action goals and faculty racial balance. Rec. vol. IV at 553. Because several schools were closing, it was necessary to assign a veritable gondola of teachers; the board entered into an agreement with the teachers' union that provided that teacher preference would be honored so long as the district's personnel goals were met. *Id.* at 555. This was expected to be a big help in complying with the board's standard. *Id.* at 559.

Mr. Moore also prepared projections for the 1987-88 school year, indicating that many K-4 elementary schools would have the system-wide black faculty average of 36.9%, plus or minus (±) 10%. *Id.* at 556-59.

He also indicated that the racial composition of the administrators at the elementary schools with 90%+ black enrollment was 4 blacks out of 10 administrators in 1986-87, and 3 blacks out of 10 administrators in 1987-88. *Id.* at 552. As for those elementary schools with less than 10% black enrollment, the racial composition of the administrators was 1 black out of 13 administrators in 1986-87, and 4 blacks out of 12 administrators in 1987-88. *Id.* Linda Joyce Johnson, affirmative action program planner for the district, corroborated Mr. Moore's statements. Rec. vol. V at 809-10. Ms. Johnson testified that the board had adopted a recommendation which would bring the faculties into greater racial balance. *Id.* The district court credited her statements. *See Dowell*, 677 F. Supp. at 1519.

Plaintiffs' expert Dr. Foster testified that the neighborhood school plan resulted in a higher concentration of black faculty at schools with the highest percentages of black enrollments and a lower concentration at schools with the lowest percentage of black enrollment. Rec. vol. VIII at 1269-70. Dr. Foster's concern was that a school should not be considered racially identifiable based upon faculty assignment. *Id.* at 1270. On direct examination, Dr. Foster was asked to comment upon the faculty assignment exhibits relied upon by the plaintiffs and this court:

> Mr. Chachkin: Now, Dr. Foster, . . . in describing the last four of those exhibits that dealt with faculty, you talked about patterns of assignment.
>
> You've been here through the defendants' testimony concerning the new board policy in administrative procedure concerning faculty assignments and affirmative action goals at individual schools; is that correct?

> Dr. Foster: Yes.
>
> Mr. Chachkin: What's your opinion concerning the new policy and procedure in light of — how is that going to affect the patterns that you've noted in your own analysis?
>
> Dr. Foster: In my opinion, if these are followed in a fairly short time, they should be productive to the extent that all schools would . . . be in line.

Id. at 1275-76.

Dr. Foster thought that it might be difficult for the district to comply with its voluntary affirmative action goal of placing ±10% of the system-wide average (36.9%) of black faculty at every elementary school, but he had no problem with such a standard. Rec. vol. IX at 1387-88. The standard might be difficult to meet because the elementary system-wide average for black faculty is only about 30%. Rec. vol. VIII at 1276. He then stated:

> Dr. Foster: Other than that, I think if the personnel services as the board adopted the policy signs off on all transfers and employment and they won't approve them unless they're in line with the goals that are outlined in the policy, it should work out.
>
> It's not that far off as it is right at the moment, but there are trends and discrepancies that have been obvious the last couple of years.

Id. at 1276-77. Dr. Foster also agreed that the imbalance of the faculty was not due to an intent to discriminate by the board, rather "[t]hey simply slid a little bit

during that period, and, as I see it, the board is now getting them back into shape." Rec. vol. IX at 1389. Thus, the district court could rely upon the nondiscriminatory one-time reason for the faculty imbalance, together with the efforts of the district to attain racial balance in the elementary faculties, and conclude that the racial imbalance in the faculty which had existed was not indicative of segregative intent.

VIII.

This court's direction to the district court to take evidence concerning "alternatives to maintain racially balanced elementary schools," modify the Finger Plan, and then "retain jurisdiction for a reasonable period of time to oversee the implementation and maintenance of [the] assignments," Court's Opinion at 53, is nothing short of a call for another remedy of unlimited duration. The district court plainly recognized that residential separation results in neighborhood schools which are virtually one-race black schools. *Dowell*, 677 F. Supp. at 1521. Plaintiffs' expert Mr. Rabin[28] testified concerning the residential separation which still exists in Oklahoma City. But this residential separation was never linked to the school board:

Mr. Day: My question, Mr. Rabin, was with regard to the actions of the Oklahoma

[28] In discussing Mr. Rabin's testimony, the court refers to him as "Dr. Rabin," and indicates that the district court would have done well to "reference" his testimony. Court's Opinion at 28. Mr. Rabin was qualified as an expert on planning and land use and the analysis of population distribution and its change over time. Rec. vol. VII at 1119. He is qualified but, as was brought out on cross-examination, Mr. Rabin does not hold a doctorate degree or any other postgraduate degree. *Id.* at 1135-36.

Based on Mr. Rabin's testimony, this court takes issue with the district court's discussion concerning the relocation of the black population which has occurred in the district. Court's Opinion at 28-29; *Dowell*, 677 F. Supp. at 1507-08. Mr. Rabin testified concerning the characteristics of various census tracts which had more than 75% + black residents. He noted that the black population has increased 2.75 times between 1950 and 1980 and that spatially, "the area of black concentration has increased very substantially." Rec. vol. VII at 1129.

Year	Number of Census Tracts 75%+ Black	% of Black Population in Those Tracts	No. of Black Residents in Those Tracts
1950	1	24.9	5,236
1960	6	69.5	

Year	Number of Census Tracts 75%+ Black	% of Black Population in Those Tracts	No. of Black Residents in Those Tracts
1970	13	73.3	
1980	16	60.8	35,691

Id. at 1132-35. The 90% + black enrollment schools are located in the concentrated tracts. *Id.* at 1134-35.

Dr. Clark analyzed 7 tracts which were concentrated in 1960 over time. One justification for studying these tracts is that they have been predominantly black throughout the entire period beginning with the district court's decree in 1963, *Dowell v. School Bd.*, 219 F. Supp. 427 (1963). *See* rec. vol. VII at 1153-54. Dr. Clark determined that in 1960, 84% of all blacks in Oklahoma City resided in these tracts; by 1980, only 16.8% resided there. *Dowell*, 677 F. Supp. at 1507. In my view, Dr. Clark came to the permissible conclusion that there was "a fair amount of population change going on in the area." Rec. vol. II at 71. He readily pointed out that census data cannot tell us that the expansion of the black population throughout the school district was attributable to blacks moving out of these tracts, but he did make the reasonable inference that some of the black population expansion in the eastern western parts of the city and county was attributable to migration from the inner city area. *Id.* at 71-72. He also acknowledged the limitations of census data just as Mr. Rabin did, rec. vol. VII at 1156, 1159, and as this court attempts to do. *Id.* at 71; *see* Court's Opinion at 25 (declaring the long census *form* "suspect").

To get away from the limitations inherent in the census data, Dr. Clark compiled relocation maps which indicate residential change for those kindergarten students who resided in the attendance areas of the fifth-year centers in 1974-75. Def. ex. 7, *reproduced in* Appellee's Addendum to Brief. Three years later, by 1977-78, of those families who relocated, 209 moved out of the school district entirely, 148 relocated within the fifth-year attendance areas and 70 moved outside these predominantly black attendance areas. *Dowell*, 677 F. Supp. at 1507; *see also* Court's Opinion at 29 (finding that 46 of the 70 moved into "white areas."). Only one family moved to the elementary attendance area to which their child was being bused. *Dowell*, 677 F. Supp. at 1507. A similar analysis was done for families with K-2 children in 1982-83 who had relocated by 1984-85. Def. ex. 8, *reproduced in* Appellees' Addendum to Brief; *Dowell*, 677 F. Supp. at 1507-08. The district court concluded from the studies that compulsory busing does not influence black relocation patterns. *Dowell*, 677 F. Supp. at 1508.

This court criticizes the relocation studies because 1) many thousands of black families live in the area, and 2) "the more predominant population shift, 148 families, was within the northeast quadrant." Court's Opinion at 29. Actually, the most predominant population

City Board of Education. Are you aware of any action the board took, after this court entered its decree in 1963, which compelled black to live in those tracts or any of the other 16 which you've identified as predominantly black?

Mr. Rabin: I'm not. No. No.

Rec. vol. VII at 1154-55. It is inimical to due process to hold this school board responsible, under power of contempt, *Dowell*, 795 F.2d at 1523, for a current condition which it did not create and is not empowered to change — residential separation. *See Dowell*, 677 F. Supp. at 1521.

The reality is that the 1972 plan no longer met the educational objectives of this district in grades 1-4. Resurrecting the 1972 Finger Plan concerning assignment, which was substantially changed over the years due to demographic change and finally replaced in 1985, probably is a step backward. A generation of students has been schooled, facilities have changed, the population has moved and the racial composition of the system has been altered significantly. The district has not been afraid of innovation to improve the educational experience; the Adopt-A-School program, *Dowell*, 677 F. Supp. at 1517, the Student Interaction

shift was to areas *outside* the studied area — some 279 families out of 427 relocated outside the district (209) or outside the studied area (70). Of those who stayed in the district, only 34.6% (148/427) stayed within the studied area. As for the court's second objection, as a practical matter the nature of the study was small; it would be unreasonable to expect the school board to offer a study with information about every relocation in the district. Even Mr. Rabin conceded that the information established that some black children and families have left the northeast quadrant and moved out to other areas of the community — he had "no doubt that that took place." Rec. vol. VII at 1157.

The district court could rely upon the demographic data in the case to conclude that there had been movement from the northeast quadrant, that residential concentration of a portion of the black population is not a vestige of a dual school system and that the defendants cannot and are not charged with the duty of eliminating residential separation. *See Dowell*, 677 F. Supp. at 1512, 1521.

Plan, Court's Opinon at 42-43,[31] and the Equity Officer and Committee,[32] are evidence of that. These programs do not result in racial balance at every school, *see* Court's Opinion at 44, but they do contribute to the district's mission of providing high-quality educational opportunity in a unitary system.

This court does not really deal with the plaintiffs' integration plan which the district court found unworkable as proposed. *Dowell*, 677 F. Supp. at 1524-26. Stating that its "focus is upon the issue of desegregation," this court ignores the practicality of implementing its mandate, declaring such concern to be "shibolethic [sic] speculation." Court's Opinion at 21-22 n.19. Of course, we know that the 1972 Finger Plan required extensive transportation, as would the proposed Foster Plan. Under Dr. Foster's plan, which restructures some elementary schools into K1-2 and K3-4 schools and leaves others as K1-4, the busing burden would be borne equitably between white and black students. The district court found that the school district would experience "a substantial wave of white flight." *Dowell*, 677 F. Supp. at 1525. Indeed, one of the permissible motivations of the neighborhood plan was to avoid white flight and increase student retention. *See* rec. vol. IV at 537-38 (discussing lower non-black retention

[31] Counsel for the school board asked some awkward questions when cross-examining Dr. Crain concerning the value of interaction between black and white children outside of school. *See* Court's Opinion at 43 n.45. Let it not go unsaid that counsel quickly admitted his "poor choice of words." Rec. vol. VII at 1093.

[32] The neighborhood plan provided for an Equity Officer and Equity Committee to monitor the schools for equality. Court's Opinion at 43; pl. hearing ex. 1 at 4; rec. vol. VI at 831. Rev. Gary Bender, chairman of the committee, testified concerning minority representation on the committee and the desire of the committee to augment the Student Interaction Plan. Rec. vol. VI at 831, 842. He also testified that in addition to concern with facilities and textbooks, the committee had also looked into the quality of the teaching staffs. *Id.* at 831-33.

rates).[33] This court does not reject that finding, although it does cast doubt upon it, based upon a footnote in a law review article that referenced an *American Lawyer* report. *See* Court's Opinion at 51 n.56. Looking at the data in this case, however, Dr. Steller indicated that if the Foster Plan were adopted some students would have switched schools three times as of the fifth grade. Rec. vol. IX at 1485. Dr. Lane testified that dismantling the neighborhood plan would be disruptive because it destroys the anchor of the neighborhood school and redirects scarce resources: "Let me put it this way. This district has opted for learning; this district has opted, it seems to me, for education; and that's where it wants to put its resources." Rec. vol. VI at 898. With finite resources and energy, the school board necessarily will have to rearrange objectives given this court's decision. Rec. vol. VI at 944 (Dr. Walberg).

Linking the defendants' constitutional responsibilities to the logistics of a 17 year-old desegregation

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[33] For example, Maridyth McBee testified concerning student retention from the fourth to the fifth grades:

Mr. Day: Ms. McBee, as a research specialist with the Oklahoma City School District, do you see any special significance to the retention ratios . . . over time?

Ms. McBee: It's obvious to see that the number of black students who were fourth graders and then subsequently become fifth graders is very similar. There are almost the same number in fourth grade as fifth grade.
For the others, that was the case in '71. However, since '71 we have lost substantial percent of non-black students from the fourth to fifth grade until 1986 when the number — the percent retained is higher.

Rec. vol. IV at 537. Clearly, the threat of white flight cannot justify a return to a dual system, however, the board may consider improved student retention in the elementary grades and its consequences for the secondary grades in an effort to secure wider integration. *See Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 719-20 (2d Cir. 1979); *Higgins*, 508 F.2d at 794. Here, the school board has retained transportation for racial balancing in all but the first four grades notwithstanding its effect on student retention.

plan requires a very static view of the world. It also confuses the original remedy with the violation. As the Fifth Circuit has said:

> [C]ontinuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable. Stated another way, the constitutional violation is purposeful separation of races in public education. The mix that would have occurred but for the racism is a judicially created hypothetical. We have insisted upon matching that model of a unitary desegregated status as a remedy for the wrong. Refusing, after the match, to allow a school district to vary from that model unless it proves its "nonsegregative" purpose confuses wrong and remedy.

Overton, 834 F.2d at 1176-77. Here, the school district proved non-segregative purpose to the district court and still does not prevail. Absent a constitutional violation, the school district should not be monitored by a federal court in perpetuity. The original desegregation decree in this case should be lifted and the schools entrusted to local control as our federal Constitution envisions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-61-9452-B

ROBERT L. DOWELL, ET AL.,
PLAINTIFFS,

VS.

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, ET AL.
Defendants.

[Filed Dec. 9, 1987]

Norman J. Chachkin and Theodore M. Shaw, NAACP Legal Defense Fund, New York, New York; John W. Walker of John W. Walker, P.C., Little Rock, Arkansas; and Lewis Barber, Jr., of Barber/Traviolia, Oklahoma City, Oklahoma, Attorneys for Plaintiffs.

Ronald L. Day and Laurie W. Jones of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, Attorneys for Defendants.

William S. Price, United States Attorney, Oklahoma City, Oklahoma; Wm. Bradford Reynolds, Assistant Attorney General, Roger Clegg, Deputy Assistant Attorney General, David K. Flynn and Mark L. Gross, Attorneys, Department of Justice, Washington, D.C., filed an amicus curiae brief for the United States.

MEMORANDUM OPINION

Before LUTHER BOHANON, United States District Judge.

No matter how complex the remedial plan invoked, it is irrational to assume that a school desegregation plan will be able to serve the needs of the community indefinitely. Oklahoma City, or any other

community served by a unitary school system, will not remain demographically stable, "for in a growing, mobile society, few will do so." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971). Following a unitary declaration in 1977, the parties are now before the court for reasons directly related to the impact of such demographic change upon the delivery of a quality education to all students.

In 1972, the court ordered the Oklahoma City Board of Education to implement a desegregation decree commonly referred to as the Finger Plan. *Dowell v. Board of Education of Oklahoma City Public Schools*, 338 F.Supp. 1256 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041. (1972). This decree was designed not only to assist the Board in satisfying its affirmative desegregative obligation, but also to allow the school district to achieve the ultimate goal — unitary status. *Dowell*, 338 F.Supp. at 1272.

After the decree had been successfully implemented, the Board moved to close the case because it had "eliminated all vestiges of state-imposed racial discrimination" and converted the school district into a unitary system. On January 18, 1977, after proper notice and hearing, the court entered an Order finding that the Board had carried out the decree and had "slowly and painfully accomplished" the goal of establishing a "unitary system."

> Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimination so corrosive of the human spirit and so plainly forbidden by the Constitution.

ACCORDINGLY, IT IS ORDERED:

1. The Biracial Committee established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

The $203,333.32 award of attorney fees and costs was the only matter on appeal. This court believed then and continues to believe that the Order Terminating Case quoted above followed the teachings of *Swann*.

For eight years, the Board continued to utilize the techniques of pairing, clustering, and compulsory busing — the tenets of the Finger Plan — through the 1984-85 school year. However, the Board had perceived progressive inequities in the Finger Plan resulting from demographic change in the community. In response, the Board adopted for school year 1985-86 a student assignment plan for grades K-4 which eliminated compulsory busing and assigned students to the elementary school located in the neighborhood where they resided. Eleven of the sixty-four elementary schools had a black student population exceeding 90% due in part to areas of residential segregation in Oklahoma City. The Board instituted the plan believing, as did the court, that the Oklahoma City schools were no longer subject to federal court supervision under *Swann*.

In 1985, the plaintiffs sought to intervene and reopen this action, challenging the School Board's decision to alter the basic method of pupil assignment at the elementary grade level. Following an evidentiary hearing in April, 1985, the court found that its unitary declaration in 1977 was binding and that the school district remained unitary in 1985. Additionally, the court concluded that the neighborhood school

plan was constitutional since it was not adopted with the intent to discriminate on the basis of race. Thus, the court ruled that special circumstances did not exist which warranted reopening the case. *Dowell v. Board of Education of Oklahoma City Public Schools*, 606 F.Supp. 1548 (W.D. Okla. 1985).

The Court of Appeals concurred that the 1977 unitary finding was binding upon the parties. *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1522 (10th Cir. 1986). However, the Court of Appeals ruled it is only when the order terminating the case also dissolves the desegregation decree that the School Board "regains total independence from the previous injunction." *Dowell*, 795 F.2d at 1521. Since this court had not expressly dissolved the 1972 decree, the Court of Appeals remanded the case "for further proceedings to determine whether the original mandatory order [would] be enforced or whether and to what extent it should be modified." *Dowell*, 795 F.2d at 1523. In these remand proceedings, the Court of Appeals placed the burden of proof on the School Board: "[t]he defendants, who essentially claim that the injunction should be amended to accomodate neighborhood elementary schools, must present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the [1972] Order." *Id.*

This court fully intended in 1977 to restore the School Board to total independence and relinquish to the Board all control over the school district. This court is now aware that it should have dissolved the injunction in 1977, as pointed out in the Circuit opinion, because the Oklahoma City schools were at that time, as they are today, operating as a unitary system, wholly without discrimination to blacks or other minority students, faculty or staff.

On February 5, 1987, this court granted the Petition for Intervention and Plaintiffs' Motion to Reopen,

and set the matter down for an evidentiary hearing on the merits. The hearing was conducted in June, 1987. Following eight days of testimony, careful review of all trial exhibits, and consideration of the arguments of counsel, the court is now entering its Memorandum Opinion containing its findings of fact and conclusions of law, and holding that the evidence of the defendants far outweighs the evidence of the plaintiffs.

I.

WHAT IS THE CAUSE OF CURRENT RESIDENTIAL SEGREGATION IN OKLAHOMA CITY?

The fundamental issue the court must address is whether the School Board has shown a substantial change in conditions warranting dissolution or modification of the 1972 Order. The existence of residential segregation in certain Oklahoma City neighborhoods has resulted in the existence of the predominantly black elementary schools which are being challenged by plaintiffs. Thus, the cause of the residential segregation which presently exists in Oklahoma City lies at the very heart of the issue the court must determine. A review of the nature of demographic change which took place in Oklahoma City following implementation of the Finger Plan sheds light on the answer.

A. Demographic Data

1. Past Governmental Barriers

By way of background, the state-compelled dual school system in Oklahoma City was rooted in state constitutional and statutory provisions mandating separation of the races for public educational purposes. Early ordinances in Oklahoma City set aside areas within which blacks and whites were to live. Past developers platted lands with restrictive covenants which prohibited the sale of homes to blacks. In 1963, this court recognized that the residential pattern of white and black people in Oklahoma City had been

set by law for a number of years. These early residential patterns had much to do with the segregation of the public schools in Oklahoma City. The east and southeast portions of the original city of Oklahoma City was black, and all other sections of the city were occupied by the white race. *Dowell v. Board of Education of Oklahoma City Public Schools,* 219 F.Supp. 427, 433-34 (W.D. Okla. 1963). Thus, the schools for blacks were centrally located in a predominantly black section of Oklahoma City, comprising generally the central east section of the city. Residential segregation was encouraged through a special transfer policy which was implemented by the Board of Education between 1955 and 1963. This "minority-to-majority" policy was stricken down by the court in 1963. *Dowell,* 219 F.Supp. at 442.

2. The East Inner-City Tracts

The nature and extent of demographic change following this state of affairs in Oklahoma City was illuminated by U.S. census data presented at the recent hearing. A census tract map of the Oklahoma City metropolitan area for 1960 clearly shows the historical concentration of black households in the east inner-city area. (Def. Ex. 2; Tr. 45). The east inner-city area lies within census tracts 13, 27, 28, 29, 30, 38 and 79. (Tr. 66). By 1970 there was a distinct and extensive spread of the black population from this area across school district boundaries to the eastern part of the metropolitan region. (Def. Ex. 3). However, there were few, if any, b'ack households in the northern, western and southern parts of the school district in 1970.

.. Relocation Statistics

Following implementation of the Finger Plan, the school district's research department conducted a study of relocation characteristics of the school district's black population. The survey focused on black families with kindergarten children residing in the east inner-city area as of 1974-75, who relocated by

1977-78. The results showed mobility: 148 families moved, but stayed within the east inner-city area; 209 families moved out of the east inner-city area, but did not relocate within the school district; and at least 70 families moved from the east inner-city area to predominantly white sections of the school district lying to the north, west and south. Only 1 of the 70 families moved within the attendance area of the elementary school to which their child was being bused for desegregation purposes. (Tr. 55-60)

The metropolitan census data for 1980 confirmed the trend revealed by the research department's study. There had been a substantial migration of blacks to the northern, western and southern parts of the school district. (Def. Ex. 4; Tr. 61). Also, the Millwood School District, to the east, became predominantly black. (Tr. 65).

Between 1960 and 1980 the east inner-city tracts remained predominantly black. Yet, as the following table reveals, there was a quite substantial decrease in the number of blacks choosing to live in this area:

	Black Population		
Tract No.	1960	1970	1980
13	4818	5463	4198
27	2696	1691	22
28	6784	4554	3504
29	3684	1183	447
30	5066	2746	853
38	3324	1625	912
79	2905	2747	2623

In 1960, 84% of all blacks residing in the Oklahoma City metropolitan area lived within these tracts. In 1980, however, only 16.8% of the total black population in the metropolitan area lived in this area. (Def. Ex. 5D; Tr. 67-68).

Also, between 1960 and 1980 there was a substantial amount of turnover in the black population residing in the east inner-city tracts.[1] For example, between 1965 and 1970 the average rate of turnover in the east inner-city area was 42%, and between 1975 and 1980 it was 33.2%. (Def. Ex. 5E). These statistics show a considerable amount of population change going on in the east inner-city area. Some blacks were choosing to live within the area and others were choosing to move away. (Tr. 71). The substantial drop in numbers in the east inner-city tracts between 1960 and 1980 accounts for much of the expansion of the black population throughout other parts of the metropolitan area.[2] (Tr. 71-72).

Since U.S. census data is only gathered every ten years, the latest available data was for 1980. However, the Oklahoma City School District maintained more current data. With this data, one of the Board's expert witnesses, Dr. William Clark, undertook a black population relocation study similar to the one conducted by the research department in the 1970's. This particular study focused on black families with kindergarten, first grade or second grade children who resided in the east inner-city area in 1982-83, and relocated by 1984-85. Of the families sampled, 324 moved out of the east inner-city area and did not relocate in the Oklahoma City school district. Three hundred five (305) families relocated within the east inner-city area. And, at least 180 black families moved to northern, western and southern parts of the school district. (Def. Ex. 8). Of these, only 2.1% moved into the attendance

[1] "Turnover" refers to persons who did not live in the same house five years previously.

[2] Between 1960 and 1980, there was a loss of approximately 43,000 whites from the main body of the school district in which the east inner-city area is located, but a gain of over 13,000 blacks. During the same period there was an increase of approximately 12,500 blacks outside school district boundaries in eastern Oklahoma County. Between 1960 and 1980, the white population in eastern, northern and western parts of the metropolitan area outside school district boundaries increased by 127,000. (Tr. 71-73).

area of the school to which their children were being bused for desegregation purposes. (Def. Ex. 9; Tr. 76). These relocation studies reveal the compulsory busing of black children to a certain area does not have any appreciable affect on where their parents choose to relocate. (Tr. 76-77).

For a different perspective, another expert witness, Dr. Finis Welch, analyzed the racial composition of the residential attendance zones in the Oklahoma City school district from 1972 to 1986. This analysis revealed that in 1972 there were 39 elementary school neighborhood attendance areas where virtually no black students (fewer than 1%) resided. By contrast, in 1986, blacks resided in every attendance area in the Oklahoma City school district. (Def. Ex. 11, 12, 13). Dr. Welch projected that the integration of Oklahoma City neighborhoods would continue to increase, and that by 1995 no attendance area in the district would have less than 16.2% black students residing there. (Def. Ex. 14).

4. Similarity Index and Exposure Index Research

Another means of analyzing the degree of segregation or integration in a defined area is through the use of dissimilarity and exposure indices.[3] The closer the dissimilarity index is to .00 the more integrated (or less dissimilar) the population. More segregation is shown as the index approaches 1.0. By contrast, the closer the exposure index is to .00, the more segregated (or less exposed) the population, and vice versa. (Tr. 128).

Between 1972 and 1986, the population residing within the Oklahoma City school district decentralized in such a fashion that the exposure of blacks to non-blacks almost doubled. In 1972, the overall expo-

[3] The dissimilarity index is a measure of how unevenly distributed the races are in a defined area. The exposure index is an alternative index showing how well integrated a defined area is. (Tr. 127-28).

sure index for the residential zones in the school district was .149; by 1986, the increased exposure of the races kicked the index up to .290 (Def. Ex. 40; Tr. 173).

Dr. Welch recently completed a study for the United States Commission on Civil Rights which analyzed, among other things, the degree of segregation in 125 school districts for a period spanning roughly 20 years. (*New Evidence on Desegregation*, Def. Ex. 27; Tr. 122-23). Of the 125 school districts studied, the Oklahoma City school district experienced the eighth largest reduction in the index of dissimilarity or, in other words, the eighth greatest improvement in integration, during the period from 1968 to 1982. (Def. Ex. 27; Tr. 130-31). In 1986, Oklahoma City ranked as the 39th largest metropolitan area in the country. Today, when the degree of dissimilarity in Oklahoma City, following implementation of the K-4 neighborhood school plan, is compared to the 24th through 56th largest metropolitan areas, the Oklahoma City school district falls in the mid-range. (Def. Ex. 38; Tr. 192). The least segregated is Columbus, Ohio, with a dissimilarity index of .136. The index for the Oklahoma City school district is .389. Birmingham, Alabama, is the most segregated with an index of .743. Even after implementing the K-4 neighborhood school plan, the degree of overall dissimilarity among the races attending school in Oklahoma City was less than that of Tulsa, Oklahoma, whose index was .557. (Def. Ex. 38).

Dr. Welch also compared the dissimilarity index in Oklahoma City following implementation of the K-4 neighborhood plan with that of other unitary school districts in the country. The comparison was made with school districts which had been declared unitary in cases involving the Justice Department. (Def. Ex. 39). Of the 47 unitary school districts analyzed, the Oklahoma City School District was the 27th most integrated (.389). At the extremes were the schools in Newton County, Georgia, which were the most integrated (.087), and those of Dekalb County, Alabama, the most segregated (.855). Regionally, Oklahoma City schools proved more integrated than those in Austin, Texas (.414) and those in Houston, Texas (.620). (Def. Ex. 39).

The degree of dissimilarity among the races attending schools in Oklahoma City is also of interest. In 1971, before the Finger Plan was implemented, the dissimilarity index district wide was rather segregative at .78. In 1984, the index revealed much more integration at .24, and following implementation of the K-4 neighborhood school plan, the index rose slightly to .38. (Def. Ex. 45; Tr. 187). The increased residential integration in Oklahoma City has resulted in a much lower level of dissimilarity today in the neighborhood elementary schools (.56) than existed in 1971 before the Finger Plan was implemented (.83). (Def. Ex. 44; Tr. 187).

5. Racial Composition of Schools Under the K-4 Plan

When viewing the demographic change which has occurred in Oklahoma City, it is helpful to keep in mind what has happened to the racial character of the student body. Between 1969 and 1986, the percentage of white students in the district dropped from 73% to 47%. The percentage of black students increased from 22.7% to 40%. And, the fraction of non-black minority students increased from 4% to 13%. (Def. Ex. 20; Tr. 153). Today, the student body is truly multi-cultural. The following table shows the racial composition of the K-4 neighborhood schools in Oklahoma City the first year the plan was effective. (Def. Ex. 63).

School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
Lafayette	2.0	1.0	5.4	5.4	86.2	13.8
Shields Heights	4.0	0.3	7.4	21.4	66.9	33.1
Hillcrest	5.1	0.8	5.6	4.0	84.5	15.5
Arthur	5.7	1.8	8.6	4.1	79.8	20.2

School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
Rancho Village	5.8	1.2	4.0	5.2	83.8	16.2
Prairie Queen	6.2	2.2	4.3	2.6	84.7	15.3
Parmelee	6.3	1.8	8.3	4.6	79.0	21.0
Davis	6.6	6.0	6.6	15.7	65.1	34.9
Willard	6.6	3.9	19.7	28.3	41.5	58.5
Coolidge	7.3	3.6	5.7	2.3	81.1	18.9
Buchanan	7.5	3.7	3.0	5.8	80.0	20.0
Lee	7.7	1.3	11.0	24.5	55.5	44.5
Southern Hills	8.0	5.1	1.1	6.8	79.0	21.0
Van Buren	8.4	0.9	11.9	3.1	75.7	24.3
Adams	8.5	0.0	4.5	7.0	80.0	20.0
Fillmore	8.7	1.5	3.3	5.7	80.8	19.2
Linwood	9.2	1.4	3.3	1.0	85.1	14.9
Wheeler	10.0	1.1	8.3	18.9	61.7	38.3
Madison	10.5	3.3	2.9	5.3	78.0	22.0
Hayes	10.7	0.0	4.9	3.4	81.0	19.0
Mark Twain	10.7	0.0	10.7	10.7	67.9	32.1
Heronville	11.0	0.7	8.2	15.4	64.7	35.3
Kaiser	11.9	2.3	0.5	4.0	81.3	18.7
Quail Creek	13.2	0.5	0.5	0.5	85.3	14.7
Columbus	14.9	1.3	9.5	23.5	50.8	49.2
Pierce	16.7	0.0	5.0	10.4	67.9	32.1
Sequoyah	16.7	1.2	4.4	4.4	73.3	26.7
Ridgeview	16.9	0.7	0.7	0.7	81.0	19.0
Hawthorne	17.2	8.1	9.7	12.9	52.1	47.9
Monroe	19.1	3.2	1.2	3.2	73.3	26.7
West Nichols Hills	21.7	1.5	2.2	1.1	73.5	26.5
Westwood	22.3	0.5	6.8	20.9	49.5	50.5
Stand Watie	24.8	1.8	7.7	15.0	50.7	49.3
Johnson	27.0	0.7	1.3	6.5	64.5	35.5
Gatewood	30.7	12.1	3.7	10.5	43.0	57.0
Horace Mann	30.7	4.3	2.7	3.2	59.1	40.9
Stonegate	31.0	2.3	0.6	1.6	64.5	35.5
Putnam Heights	31.1	9.8	4.0	5.1	50.0	50.0
Eugene Field	31.3	4.7	9.8	26.5	27.7	72.3
Wilson	31.3	11.2	4.6	6.6	46.3	53.7
Bodine	32.7	1.9	3.2	1.4	60.8	39.2
Arcadia	35.6	0.0	6.9	2.8	54.7	45.3
Shidler	35.9	0.0	5.9	28.9	29.3	70.7

School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
Britton	36.5	1.7	1.7	1.7	58.4	41.6
Rockwood	39.0	0.7	6.6	11.1	42.6	57.4
Harrison	41.6	0.7	1.3	3.9	52.5	47.5
Oakridge	43.5	1.5	3.0	1.5	50.5	49.5
Willow Brook	46.3	1.2	1.2	2.7	48.6	51.4
Star	54.5	0.0	1.2	0.3	44.0	56.0
Telstar	55.8	1.7	3.3	2.1	37.1	62.9
Edgemere	56.3	19.3	2.7	6.0	15.7	84.3
Western Village	60.0	3.8	0.6	0.9	34.7	65.3
Spencer	71.6	0.6	1.4	0.6	25.8	74.2
North Highland	96.3	0.9	0.0	0.0	2.8	97.2
Dewey	96.6	0.4	0.0	0.0	3.0	97.0
Lincoln	97.2	1.0	0.6	0.0	1.2	98.8
Parker	97.3	0.0	0.9	0.5	1.3	98.7
Polk	98.4	0.4	0.0	0.0	1.2	98.8
Truman	98.7	0.0	0.0	0.0	1.3	98.7
Creston Hills	99.0	0.0	0.0	0.0	1.0	99.0
Garden Oaks	99.0	0.5	0.0	0.0	0.5	99.5
Edwards	99.5	0.0	0.0	0.0	0.5	99.5
Longfellow	99.6	0.0	0.4	0.0	0.0	100.0
King	99.7	0.0	0.3	0.0	0.0	100.0
District Elementary Students	36.0	2.3	4.2	6.8	50.7	49.3

It is notable that today the students attending K-4 elementary schools in Oklahoma City are 50.7% white and 49.3% non-white minority. While it is true that the new assignment plan resulted in some schools which are 90% or more black, the plan created *no* schools which are 90% or more white. In contrast, prior to the time the Finger Plan was implemented, there were a substantial number of 90% or more white schools in the district. Today, the vast majority of the elementary schools in Oklahoma City are truly racially mixed.

Many jurists and scholars have speculated about the forces which mold the racial composition of neighborhoods. Although these forces are often complex, the evidence here shows they are not unidentifiable. In the old system of state-compelled segregation, un-

lawful governmental barriers were in large part responsible for the residential segregation of the races. However, over time these barriers have been totally removed.

B. Removal of Past Governmental Barriers

In 1935, for example, the Oklahoma Supreme Court declared Oklahoma City Ordinance No. 4524, commonly known as the "Segregation Ordinance," void for being in conflict with the Fourteenth Amendment to the United States Constitution. *Allen v. Oklahoma City,* 52 P.2d 1054 (1936) (construing *Buchanan v. Worley,* 245 U.S. 60, 38 S.Ct. 16, 16 L.Ed. 149). In 1948, by virtue of the United States Supreme Court's decision in *Shelley v. Kraemer,* 334 U.S. 1 (1948), restrictive covenants were rendered unenforceable in the courts. *See also Correll v. Earley,* 205 Okl. 336, 237 P.2d 1017 (1951). In 1954, the Supreme Court's landmark decision in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) (*Brown I*), rendered Oklahoma's constitutional and statutory provisions mandating separation of the races for educational purposes unconstitutional, null and void, and unenforceable. *See Dowell,* 219 F.Supp. at 433.

As the old laws were set aside, new protective legislation took hold. In 1963, the Oklahoma Legislature established the Oklahoma Human Rights Commission and clothed that agency with authority to deal with racially motivated employment discrimination, 74 O.S. § 951, et seq. In 1965, the Oklahoma City Council passed an ordinance which prohibited discriminatory practices at any place of public accomodation. (Oklahoma City, OK, Ordinance 11018 (1965)). In 1968, the Oklahoma Legislature passed an Act to provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964. 25 O.S. 1971 § 1101 et seq. In 1970, the Oklahoma City Council enacted fair housing ordinances prohibiting discrimination in housing by financial institutions, real estate brokers

or city employees. (Oklahoma City, OK, Code § 21-166.5 (1970)). In 1980, the Oklahoma City Human Rights Commission was created and given authority to cooperate with law enforcement agencies in rectifying any apparent violations of any ordinances pertaining to discrimination and related matters. (Oklahoma City, OK, Ordinance 15702 (1980)). And, the state legislature in 1985 enacted detailed statutes to deter housing discrimination. 25 O.S. § 1451-1453.

The foregoing decisions, statutes and ordinances reveal that not only have the unlawful and deplorable governmental barriers of the past been removed, but that laws have also been enacted to deter governmental discrimination in the future. The testimony of several black witnesses showed that today black people in Oklahoma City voluntarily choose where they wish to reside, unrestricted by the unlawful barriers of the past. (Tr. 313; Tr. 678).

C. Current Causes of Residential Segregation

Having determined that unlawful governmental barriers of the past have been finally laid to rest, the court views it appropriate to identify the forces presently at work which are molding the racial composition of the neighborhoods in Oklahoma City. In 1985, the United States Commission on Civil Rights called for a study on the causes of residential segregation in America. Dr. William Clark, one of the Board's experts, was commissioned to conduct the study and present findings to the Commission. After presenting his findings to the United States Commission on Civil Rights, Dr. Clark published the substance of his study. *Residential Segregation in American Cities: A Review and Interpretation,* Population Research and Policy Review 5:95-127 (1986); (Def. Ex. 10; Tr. 82). Dr. Clark's study showed that today the factors which influence

residential segregation are: (1) economics and housing affordability; (2) personal preferences and social relationships; (3) urban structure; and (4) private discrimination. (Def. Ex. 10; Tr. 84).[4]

Empirical evidence suggests that between 30-70% of racial separation in America today is attributable to economic status. (Def. Ex. 10, p. 1). The gains in black income generally made in the 1960's and 1970's is being expressed in the spatial pattern of black households today. (Tr. 86). With respect to personal preferences, the research shows that black households prefer neighborhoods which are 50% black and 50% white, while white families prefer neighborhoods ranging from 0-30% black. (Def. Ex. 10, p. 1; Tr. 85). Once a neighborhood becomes 25-30% black, research reveals that, due to personal preferences, white households start leaving the neighborhood. However, the neighborhood changes as much because white households prefer not to move into these areas. (Tr. 105). There are very, very small proportions of white households which move into neighborhoods that are predominantly black. (Tr. 105). The current preferences of blacks and whites are not unlike those of other ethnic groups. Vietnamese, Koreans, Japanese and Hispanics each have a high level of preference for people of their own race. (Tr. 111).

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[4] In addition to the reasons given by the expert witnesses in this case, it is not surprising that many blacks have chosen to remain in the northeast quadrant. The vast majority of the recreational facilities and cultural sites which make Oklahoma City such a desirable place to live are located in the northeast quadrant: the Cowboy Hall of Fame and Western Heritage Center, the Harn Homestead and 1889'er Museum, State Museum of Oklahoma, and the soon-to-be-completed, multi-million dollar Remington Park horse racing track. The Lincoln Park complex located on recently re-named "Martin Luther King Avenue" in the northeast quadrant, contains the nationally-renowned Oklahoma City Zoo, the finest municipal golf course, the Kirkpatrick Center Museum Complex and Omniplex, the National Softball Hall of Fame and Sports Complex, the Oklahoma Firefighters' Museum, and the 45th Infantry Division Museum. The City's nationally recognized Northeast High School is located in this quadrant, as is the State Capitol. Additionally, the premier medical research facility, Oklahoma Teaching Hospitals, and the V.A. Medical Center are found in the northeast sector. There can be no argument that the City of Oklahoma City has slighted this sector of the community.

Urban structure involves the relationships of cities and suburbs, the patterns of transportation, and the behaviors of individuals. A large number of studies show that households tend to move nearby. This element of the urban structure explains why we see patterns of growth spreading from previously concentrated areas. (Tr. 87-88). Today, private discrimination, such as racial "steering" by realtors, is one factor which contributes to the racial composition of neighborhoods. Yet, it is a much smaller factor than it was 30 years ago. (Tr. 85). Surveys of black households in Kansas City and Little Rock revealed that the vast majority of black families did not view themselves as having been the subject of private housing discrimination. (Def. Ex. 10, p. 119). This does not mean that there have been no acts of private housing discrimination. However, if most real estate transactions were guided by discriminatory intent, it would appear logical that people would report it in their experience more often than they do.

The causes which impact contemporary residential segregation explain why the east inner-city area in Oklahoma City remains predominantly black today. With the removal of the governmental barriers of the past and motivations of housing affordability and personal preferences, a vast number of blacks left the east inner-city area and integrated Oklahoma City's predominantly white neighborhoods. As a result of personal preference, very few white families moved into the east inner-city area. The exodus of a large number of blacks and the lack of white movement into the area has left the east inner-city area much less populated, but still predominantly black.

D. Summary

From the time of this court's original decision in this case over 25 years ago, the Oklahoma City Board of Education has taken absolutely no action which has caused or contributed to the patterns of the residen-

tial segregation which presently exist in areas of Oklahoma City. If anything, the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City. The Board's use of busing in grades 5-12 cannot help but promote neighborhood integration and deter residential segregation in the future. No court is equipped with the judicial power or machinery necessary to eradicate residential segregation. This phenomenon develops even in the midst of court ordered desegregation. For example, when the Finger Plan was implemented in 1972, the North Highlands attendance area in northern Oklahoma City was not predominantly black. Yet, despite more than a decade of compulsory desegregation, black families voluntarily chose to move into the North Highlands neighborhood. As a result, North Highlands today is predominantly (90% or more) black. Neither this court nor the Oklahoma City Board of Education can govern and control where people choose to live. All expert witnesses agreed there is virtually nothing a court or a board of education can do to eliminate residential segregation in Oklahoma City or elsewhere. In fact, the evidence showed that no desegregation decree has had the effect of eliminating residential segregation anywhere in America.

As the United States Supreme Court observed in *Swann*, 402 U.S. at 31, few communities served by school districts with newly acquired unitary status will remain demographically stable. Oklahoma City is no exception. The Supreme Court has also recognized "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." *Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973). That time has arrived in Oklahoma City. While the history of discrimination in Oklahoma City

cannot be ignored, it "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980).

II.

WHY WAS THE K-4 STUDENT ASSIGNMENT PLAN ADOPTED?

The Board of Education asserts that over time the substantial demographic changes in Oklahoma City rendered the Finger Plan inequitable and oppressive. The resulting inequity, the Board contends, was the primary factor motivating its adoption of the new student assignment plan at the elementary level. The court will now turn its attention to the validity of the K-4 plan.

A. Review of the Finger Plan

An understanding of the tenets of the Finger Plan is essential to understanding the asserted resulting inequity. The Finger Plan restructured high school and middle school attendance zones so that each school enrolled both black and white students. A feeder system was used so that students were assigned to a high school or middle school based on the elementary attendance zone in which their home was located. *See generally Dowell*, 338 F.Supp. 1256.

At the elementary level, the majority black schools located in the east inner-city area were converted to fifth-year centers, while all other schools served grades 1-4. White students attended their neighborhood school for grades 1-4, and were bused to the former black schools for the fifth grade. Black students were bused to the majority white schools for grades 1-4, and attended their neighborhood school in the fifth grade. *Id.* at 1268.

If racial balance existed in an elementary neighborhood zone, or was subsequently achieved through demographic change, the elementary school in that zone qualified as a K-5 "stand-alone" school. When the Board recognized "stand-alone" status had been achieved, the fifth grade was returned to the neighborhood elementary school, and children were no longer bused into or out of that neighborhood zone to achieve racial balance. *Id.*

B. Creation and Adoption of the K-4 Plan

Between 1982 and 1984, studies conducted by the school district's research department revealed that certain inequities directly linked to the K-5 "stand-alone" concept were starting to surface. (Def. Ex. 69 - 75). When the Board recognized Bodine Elementary School in southeast Oklahoma City as a K-5 "stand-alone" school in 1984, the perceived inequities surfaced once again. As a result, in July of 1984, the Board of Education appointed a committee to study the "stand-alone" school concept and to report back with positive recommendations. The committee was comprised of three School Board members. Dr. Clyde Muse, a black minister with a Ph.D. in education, chaired the committee. The other committee members, Mrs. Susan Hermes and Mrs. Betty Hill, each had prior experience as certified school teachers. The committee met on an almost daily basis at the school district's research department for the purpose of fulfilling its charge. Needed data and statistics were provided to the committee by the district's sophisticated research staff. While the committee was meeting, Dr. Muse traveled to the Office of Civil Rights in Dallas, Texas, for consultation and advice. (Tr. 428).

1. Increased Busing Burdens on Young Black Pupils

In November, 1984, the committee presented its report to the Board of Education. The committee study revealed that after the Finger Plan was implemented

in 1972, demographic changes slowly took place which integrated more and more neighborhoods, particularly those in central Oklahoma City. In 1985, as a result of these demographic changes, there were approximately 13 elementary schools in neighborhoods with racial balance which qualified for K-5 "stand-alone" status. (Tr. 427). The study revealed that if K-5 "stand-alone" status was granted to the ever increasing number of elementary schools which qualified, then the young black students, previously bused into those schools from the east inner-city area, would have to be reassigned and bused to more distant schools. (Tr. 425). Since most of the racially balanced neighborhoods were centrally located in Oklahoma City, the reassignment of young blacks, the committee explained, would have to be to schools located further north, west or south. The obvious result would be to increase the busing burden, in terms of time and distance, on young black children in grades 1-4. (Tr. 425).

2. Closing of Fifth-year Centers in the Northeast Quadrant

In addition, the committee pointed out that when a "stand-alone" school reacquired its fifth grade, this caused the student population at the fifth-year centers located in the east inner-city area to drop. (Tr. 426). Under school district guidelines, if enrollment dropped below a certain level in a given school, the school was subject to closing. The ultimate effect would be to leave a predominantly black part of the community without public schools. All fifth-year centers had enrichment programs which included intramurals, string instruments, special interest sessions and "Opening Doors" programs. The committee found it would be increasingly difficult to make these special fifth-year center programs equally available across the district to all of the potential K-5 "stand-alone" schools. (Def. Ex. 95).

C. Experts Acknowledge "Stand-Alone" Inequities Existed

It is significant to the court that plaintiffs agree with the defendant Board that the Finger Plan ultimately proved inequitable. Dr. Finger testified that compulsory desegregation plans are not designed to last forever and that changes in plans become necessary as a result of demographic forces. (Tr. 1192) He acknowledged the increased busing burden on young blacks and the potential for the loss of fifth-year centers as a result of the "stand-alone" feature in the plan. (Tr. 1202). In fact, Dr. Finger expressed surprise that the plan had not already been modified as a result of demographic change. (Tr. 1198-99).

Another expert for plaintiffs, Dr. Gordon Foster, also agreed that the inequities resulting from the "stand-alone" feature justified modification of the plan. (Tr. 1266-67). Counsel for plaintiffs assert that the method of pupil assignment under the Finger Plan was not fully equitable and that these inequities were exacerbated by the "stand-alone" school concept. In the Pretrial Order, "Plaintiffs' Contentions" (Appendix "A", p. 3), counsel for the plaintiffs states:

> The "stand-alone school" feature of the original Finger Plan, over time, increased the burdens borne disproportionally by Black children. As new areas of the district qualified for "stand-alone" status the distances which Black students in grades 1-4 would have to be transported increased and the likelihood that schools in black residential areas would be closed increased.

In plaintiffs' Trial Brief (p. 14) counsel states:

> One of the principal bases advanced in 1985 for the system's adoption of a new assignment plan in grades 1-4 was the inequitable burdens being borne by Black students residing in

> northeastern Oklahoma City. These concerns are legitimate ones which are shared by plaintiffs.

Expert witnesses for the defense also confirmed inequity flowing from the "stand-alone" school concept. Dr. Finis Welch stated that in his opinion the Finger Plan was designed for a district that is 20% black. According to Dr. Welch, in light of the overall demographic change in the community, the plan could not last and was destined to fail. As Dr. Welch explained, demographic change directly affected the "stand-alone" school feature so as to "whiplash" the remainder of the district with increased busing burdens. (Tr. 219-21). Dr. Welch pointed out that if the "stand-alone" feature was followed year-by-year into the future, the inequity flowing from the "stand-alone" concept would continue to increase. (Tr. 222-25).

D. Summary

This court agrees with the parties and concludes without question that, over time, demographic change in Oklahoma City has rendered the "stand-alone" school feature in the Finger Plan inequitable and oppressive. In so ruling, the court is mindful of *Swann's* admonition that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30.

Since all parties agree and the court concurs, that tenets of the Finger Plan proved inequitable and oppressive by virtue of demographic change, the remaining question becomes whether the inequity warrants dissolution or modification, and if so, to what extent. However, before reaching any conclusions with respect to dissolution or modification, the court deems it imperative to determine if the Oklahoma City School District has maintained its unitary status since 1977.

III.

HAS THE SCHOOL SYSTEM RETAINED ITS UNITARY STATUS?

Six separate components of a school system must be non-discriminatory before total unitary status can exist: (1) faculty; (2) staff; (3) transportation; (4) extra-curriculur activities; (5) facilities; and (6) the composition of the student body. *Green v. County School Board of New Kent County,* 391 U.S. 430, 435 (1968). At the time this court totally relinquished jurisdiction in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the school district had reached the goal of becoming a desegregated, non-racially operated, and unitary school system. The Tenth Circuit Court of Appeals recognized that this non-appealed unitary finding is binding upon the plaintiffs. *Dowell,* 795 F.2d at 1522.

A. K-4 Plan Was Adopted Without Discriminatory Intent

A once unitary school district may lose its unitary status by partaking in intentionally discriminatory acts creating de jure segregation. The potential for such regression is recognized in the *Swann* decision which, however, warned that a district court's intervention subsequent to the achievement of unitary status is not anticipated "absen[t] . . a showing that . . . school authorities . . . ha[ve] deliberately attempted . . . to affect the racial composition of [its] schools." *Swann,* 402 U.S. 1, at 32. In its *Keyes* decision, the Supreme Court reaffirmed this aspect of *Swann* and recognized that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention. *Keyes,* 413 U.S. at 211.

The *Swann* and *Keyes* decisions, therefore, stand for the proposition that subsequent to the achievement of unitary status, the de facto/de jure distinction mandates a search for discriminatory intent before governmental action may be declared unconstitutional. The relevancy of intent under these circumstances was again emphasized by the Supreme Court in its *Dayton I* decision:

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which [was] *intended* to, and did in fact, discriminate against minority pupils, teachers, or staff. (Emphasis added).

Dayton Board of Education v. Brinkmann, 433 U.S. 406, 420 (1977) (*Dayton I*).

Although the Court of Appeals held that the plaintiffs herein do not have the burden of proving discriminatory intent, the court did not rule that the question of intent was irrelevant. To the contrary, the court examined this court's findings in 1985 with respect to discriminatory intent to determine if reversal would be futile. The Court of Appeals concluded that the plaintiffs were not prepared to address this substantive question and remanded the case for further factual determinations. *Dowell,* 795 F.2d at 1523. Even though the Oklahoma City School District had earlier achieved unitary status, the Court of Appeals directed that on remand the defendant Board of Education would carry the burden of proof since the original decree had never been dissolved.

At trial, the Oklahoma City Board of Education carried the burden of proof; this court concludes that the Board proved by a preponderance of the evidence that its new student assignment plan was adopted without the intent to discriminate on the basis of race.

As the court noted earlier, adoption of the new plan was primarily motivated for the legitimate and non-discriminatory purpose of avoiding the oppressive realities demographic change cast upon the "stand-alone" school concept.[5]

B. K-4 Plan Was Adopted For Legitimate, Non-Discriminatory Reasons

1. Parental Involvement

However, the evidence disclosed there were additional non-discriminatory reasons why the Oklahoma City Board opted for neighborhood schools at grades K-4. One such reason was to increase the degree of parental involvement in the schools. As Professor James Coleman writes, "government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation." Coleman, *New Incentives for Desegregation*, 7 Human Rights 10, 13 (1978). In 1969, there were 95 parent-teacher associations (PTA's) in the Oklahoma City School District with a total membership of 26,528. (Def. Ex. 140, p.2). At the time the Board adopted the new plan in 1985, the number of PTA units had decreased to 15 and the total membership had dropped to 1,377. (Def. Ex. 140, p. 2). When the Board adopted its new plan it was convinced, and virtually every expert in this case agrees, that *parental involvement is essential to student academic achievement and a quality education.* (Tr. 515,

[5] The Supreme Court addressed the burden of proof issue, at least with respect to dual systems, in two cases. In *Swann* the Court ruled that "[w]here the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory." 402 U.S. at 26. And, in *Keyes*, the Court explained that "where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent . . . segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts." 413 U.S. at 210. It appears the Tenth Circuit places the same burden on a unitary district where the original desegregation decree has never been dissolved.

736, 849, 891, 916, 1066-68, 1455). The evidence shows that the Board previously took steps in an effort to increase the level of parental involvement. For example, an attempt was made to implement a district-wide parents' council. School Board meetings were moved out into the community. Buses were sent to certain schools to pick up parents for meetings. However, all of these efforts failed. (Tr. 515-16, 594).

The Board believed that neighborhood elementary schools would increase parental involvement, and they were correct. After the plan was in operation for just one year, the number of PTA organizations increased by 100% and PTA membership increased by 80%. Following the second year of implementation, the number of PTA organizations had increased a total of 200% and PTA membership had increased by a total of 144%. (Def. Ex. 139-40). Following the implementation of the plan, the number of elementary parents attending open house and parent/teacher conferences substantially increased as well. Open house attendance was up 5,167 and 3,745 more parents attended parent/teacher conferences in 1986-87 than in the year preceding the plan. (Def. Ex. 140, 144-46).

2. Community Involvement

An increase in the level of community involvement with the public schools was also noted following implementation of the plan. The school system has an Adopt-A-School program under which local businesses and organizations donate time, goods, or services to particular schools in the district. The second year the plan was in operation there were 349 adopting organizations, making a total of 522 adoptions. By contrast, the year before the plan there were 53 adopting organizations, making a total of 111 adoptions. (Def. Ex. 142-43). A substantial amount of expert testimony was presented at trial which directly related these increases in parental and community involve-

ment to the adoption of the K-4 neighborhood plan. (Tr. 349-50, 428-29, 518-20, 584-85, 630, 736-37, 775, 853-54, 868, 897, 919).

C. K-4 Plan's Adoption Does Not Disturb the Components of the Unitary School System

1. Racial Imbalance Alone Does Not Mandate A Non-Unitary Finding

In reaching the conclusion that the Board did not adopt its new plan with discriminatory intent, the court sharply focused on the racial composition of the predominately black schools which came into being as a result of the neighborhood plan. Plaintiffs point out that many of the schools which were predominately black before the Finger Plan was implemented are predominately black today as a result of the neighborhood plan. Plaintiffs make much of the point that when the Board adopted the new plan, they incorporated the same neighborhood attendance zones that were used prior to the time the Finger Plan was implemented. However, this argument cuts both ways. The fact that the Board never gerrymandered the geographic composition of its neighborhood attendance zones also demonstrates that the Board in no way resisted the expansive migration of blacks into predominately white neighborhoods. The court also views it as significant that one of Plaintiffs' experts who had thoroughly investigated the case, Dr. Mary Lee Taylor, testified on cross-examination that in her opinion the Board did not adopt the plan with discriminatory intent. (Tr. 1238).

In sum, the only evidence which could support the notion that the Board adopted the plan with discriminatory intent is the fact that the plan did have a disproportionate impact upon some blacks in the district. However, the Supreme Court has reiterated that *discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure*

upon one race. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). *See also, Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536 n.9 (1979) (*Dayton II*) ("The foreseeability of segregative consequences" is insufficient to make out a prima facie case of purposeful racial discrimination.).

Furthermore, the United States Supreme Court "has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (*Milliken II*). *See generally Dayton II*, 443 U.S. at 531 n.5 (Mere "racial imbalance . . . is not per se a constitutional violation."); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (The existence of both "predominately black and predominately white schools in a community is not alone violative of the Equal Protection Clause."); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976) (An order contemplating the "substantive constitutional right [to a] particular degree of racial balance or mixing" is infirm as a matter of law.); *Swann*, 402 U.S. at 26 (The existence of some one-race schools within a district "is not in and of itself the mark of a system that still practices segregation by law".). Therefore, "a neighborhood school policy in itself does not offend the Fourteenth Amendment." *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 537 n.15 (1982). It follows that a school board serving a unitary school system is free to adopt a neighborhood school plan so long as it does not act with discriminatory intent.

The search for unitariness, however, involves more than an analysis of the composition of the student body. In 1973, the Supreme Court emphasized that "[i]n addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration" in determin-

ing whether or not a system is governed by de jure segregation. *Keyes*, 413 U.S. at 196. A review of these additional factors, therefore, is appropriate with respect to Oklahoma City.

2. *Integrated Faculty And Staff Assignments Support A Unitary Finding*

In 1963, the predominately black elementary schools in Oklahoma City employed all black principals and all black teachers. *Dowell*, 219 F.Supp. at 445-46. In contrast, today the principals and teachers at all schools, including the predominately black K-4 elementary schools, are both black and white. (Def. Ex. 187, 201). Thus, young black students continue to have contact with and the opportunity to learn from white teachers, and conversely, white students continue to have similar opportunities to meet, know and learn from black teachers. Interaction of this nature is desirable, and does not occur in truly segregated schools. *Columbus Board of Education v. Penick*, 443 U.S. 449, 467 (1979).

Although the faculties serving the elementary schools in Oklahoma City have remained integrated since the 1972 decree was implemented, they have not remained in perfect racial balance. Yet, to this day, the Board of Education continues to strive for balance through the implementation of its Affirmative Action Plan. (Def. Ex. 188; Tr. 802-03). Plaintiffs assert that vestiges of segregation remain in Oklahoma City since some of the schools with a higher concentration of black students have more black teachers than other elementary schools. The court finds this contention without merit. The Constitution does not freeze the black-white faculty ratio as of the date of the initial faculty desegregation. Once successful desegregation has occurred and a school system has achieved unitary status, "the system-wide racial ratio may thereafter change from time to time as a result of non-discriminatory" action. *Carter v. West Feliciana Parish School*

Board, 432 F.2d 875, 878-79 (5th Cir. 1970). *Accord Lee v. Walker County School System*, 594 F.2d 156, 159 (5th Cir. 1979). Indeed, "after faculty desegregation has been effectuated by remedial orders based on racial ratios," a school board is not obligated to make personnel decisions on the basis of such ratios. *Lee v. Russell County Board of Education*, 563 F.2d 1159, 1163 (5th Cir. 1977).

The evidence in this case showed that when the 1985 student assignment plan was implemented, the Board of Education entered into negotiations with the teachers' union to address the question of teacher assignments. Under the negotiated agreement, the teachers with seniority had more discretion in selecting their teaching assignment. (Tr. 548-49). Teacher and administrator preferences, to a large extent, determined faculty assignments following implementation of the plan. (Tr. 549). Where teachers lived, no doubt, influenced their preferences about where they wished to work. The court therefore concludes that teacher assignments in the school district were not motivated by discriminatory purposes. Moreover, the evidence showed that last year the Oklahoma City Board took action pursuant to its Affirmative Action Plan which will have the effect of bringing elementary faculties into racial balance in 1987-88. (Tr. 809)

3. *Attitudes Of Community And Administration Support A Unitary Finding*

As noted above, the attitudes of members of the community and the school administration are relevant in determining whether or not a school system is governed by de jure segregation. At the hearing, a substantial number of black school administrators and black patrons unequivocally testified that in their opinion the Board's K-4 neighborhood school plan was not discriminatory and did not result in the recreation of a dual school system. (Tr. 338, 431, 566, 576, 679, 798, 815).

4. Equitable Facilities And Expenditures Support A Unitary Finding

The uncontroverted evidence in this case showed that the school facilities under the neighborhood plan are not discriminatory. (Tr. 788, 832, 885, 893-94). Since most of the predominately black schools today served as fifth-year centers under the Finger Plan, they are actually in much better condition today than, for example, many elementary schools in southeast Oklahoma City. (Tr. 356). Of particular interest is the fact that expenditures made by the Board for the students in the predominately black elementary schools is greater than that made in the elementary schools with a black population of less than 10%. (Def. Ex. 126).

5. Additional Factors Support A Unitary Finding

Plaintiffs did not dispute that the present curriculum and extra-curricular activities in the school district are non-discriminatory. A mass of documentary evidence was admitted showing beyond question that the Board is not discriminating in these areas. (Def. Ex. 111-24). Additionally, the court views it as significant that the Board has elected to employ intelligent and competent black individuals in upper-echelon central office administrative positions. (Tr. 542-43). The diversity among the faculty and staff was graphically demonstrated by the employees testifying during the trial:

Black

Belinda Biscoe
Admins. for the
Department of
Support Programs
(Tr. 295)

Vern Moore
Executive Director of
Personnel Services
(Tr. 540)

White

Maridyth Montgomery
McBee
Senior Research
Associate (Tr. 534)

Dr. Carolyn Sue Hughes
Assistant Superintendent
for Curriculum and
Program Development
(Tr. 682)

Betty G. Hopkins Mason
Assistant Superintendent
for Instruction and
Related Services
(Tr. 571)

Dr. Arthur Wayne Steller
Superintendent of Okla.
City Public Schools
(Tr. 697)

Odette M. Scovey
Teacher/Principal for
27 years
(Tr. 785)

Linda Joyce Johnson
Affirmative Action
Program Planner
(Tr. 798)

No doubt, their presence will serve to deter racially discriminatory actions or any attempt to return to the dual system.

D. Summary

Taken together, the foregoing factors lead the court to conclude that the Oklahoma City School District has remained unitary from 1977 to the present.

IV.

SHOULD THE 1972 DECREE BE ENFORCED, MODIFIED OR DISSOLVED?

A. The Legal Test To Be Employed

With an understanding of the conditions presently existing in Oklahoma City, the court now shifts its attention to the fundamental issue on remand: Should the 1972 desegregation decree be enforced, modified or dissolved? The Court of Appeals has articulated guidelines which govern the dissolution or changing of mandatory decrees. *Securities and Exchange Commission v. Jan-dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970) (An injunction may be dissolved or modified where the underlying facts have so changed that the

dangers prevented by the injunction have "become attenuated to a shadow."); *Securities and Exchange Commission v. Thermodynamics, Inc.*, 464 F.2d 457, 460 (10th Cir. 1972) (In vacation proceedings, an injunction may be dissolved where there is a showing of "some substantial change in law or facts."); *E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795, 800 (10th Cir. 1979) (A decree may be vacated or modified where it is shown that changed conditions have produced "hardship so extreme and unexpected" as to make the decree oppressive.). The decisions of the Court of Appeals establishing these guidelines all point to one primary source of authority – the Supreme Court's decision in *United States v. Swift & Co.*, 286 U.S. 106 (1932). Therefore, an understanding of the context within which the *Swift* case was decided is essential. This was succinctly explained by the Supreme Court when it subsequently handed down its decision in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968). *Swift* emphasized the power of a court of equity "to modify an injunction in adaptation to changed conditions though it was entered by consent." 286 U.S. at 114. The question in *Swift* was "whether enough had been shown to justify modification. *Id.* at 115. *United Shoe* points out that the danger of monopoly which led to the initial decree in *Swift* had not been removed. Thus, although in some respects the *Swift* decree had been effectuated, there was still a danger of unlawful restraints on trade which justified perpetuation of the decree. *United Shoe*, 391 U.S. at 248.

In *United Shoe*, the Supreme Court clarified the meaning of its prior decision and cautioned that its earlier statement in *Swift* – "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change [the decree]" – must be read in the context of the continuing danger of unlawful restraints on trade which the Court found still existed. *Id.* In conclusion, the Court in *United*

Shoe held, "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Id.* Thus, in the process of determining whether dissolution or modification is warranted, it is essential for the court to determine whether the "purposes of the litigation," as incorporated in the 1972 desegregation decree, have been fully achieved.

1. The Purposes Of The 1972 Injunction Have Been Fully Achieved

In *Swann*, the Supreme Court identified the "purpose" of a desegregation case:

> Our objective in dealing with the issues presented in these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

402 U.S. at 23.

Since there is no substantive constitutional right to "any particular degree of racial balance or mixing . . . [t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24. It is, therefore, clear that the purpose of a desegregation case is not to maintain racial balance in the public schools. Rather, the repeated mandate in each of the Supreme Court's decisions from *Brown I* to *Swann* is "the elimination of the discrimination inherent in the dual school systems." *Id.* at 22. Thus, the "target" of a desegregation case is the "dual school system," and the remedy commanded is to dismantle the dual

school system. *Id.* The Oklahoma City School District dismantled the dual system and met this objective in 1977, when it was declared unitary. Accordingly, perpetuation of the 1972 decree no longer serves the objective of this case.

The purpose of a desegregation remedy is to "correct" the condition that offends the Constitution. *Id.* at 16. It may not be more extensive than is necessary to eliminate the constitutional violation. *Brennan v. Armstrong*, 433 U.S. 672, 673 (1977); *Milliken II*, 433 U.S. at 281-82; *School District of Omaha v. United States*, 433 U.S. 667, 669 (1977). Thus, the remedy may not be "aimed at eliminating a condition that does not violate the Constitution." *Milliken II*, 433 U.S. at 282. If it were not for certain areas of residential segregation presently existing in Oklahoma City, the court is convinced that the plaintiffs would not have the defendant Board engaged in the present contest. In essence, plaintiffs are asking this court, contrary to the teaching of *Swann*, to perpetuate a remedy to "correct" a condition that does not violate the Constitution. As the court noted earlier, *the Oklahoma City Board of Education is not responsible for the present state of residential segregation in Oklahoma City.* As Justice Powell stated in his concurring opinion to grant certiorari in *Austin Independent School District v. United States*, 429 U.S. 990, 994 (1976):

> The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.

Plaintiffs are also proposing that this court perpetuate a remedy which *cannot* correct the condition they object to — residential segregation. Virtually all experts in this case agreed that no compulsory desegregation plan implemented by a public school system can eliminate residential segregation, regardless of how long the plan is in operation. (Tr. 115-16, 1028-29, 1245-46). Under plaintiffs' rationale, this court should continue the busing of young students in Oklahoma City until such time as racial balance exists in all neighborhoods. Yet, plaintiffs do not suggest how the school district should go about creating this balance or what kind of order this court could enter that might, as a practical matter, have a chance of changing the present patterns of residential segregation. If this court were to continue the busing of young students until residential segregation no longer existed, then the court would be ordering busing in perpetuity. Such action would be oppressive to the citizens of this community, unrelated to the objective of a school desegregation case, and beyond the scope of an unlawful discrimination remedy. As the United States Supreme Court stated in *Wygant v. Jackson Board of Education*, 476 U.S. ____, 90 L.Ed.2d 260, 270 (1986).

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

It is important to note that a remedial desegregation decree is not designed to continue in perpetuity. Rather, "the displacement of local government by a federal court is presumed to be temporary." *Spangler*

v. Pasadena City Board of Education, 611 F.2d 1239, 1241 (9th Cir. 1979). The remedy is designed to operate during the "interim period when remedial adjustments are being made" to eliminate the dual school system. *Swann*, 402 U.S. at 28. When "the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated," the school district becomes unitary. *Id.* at 31-32. At that point in time, the "court-ordered remedy has accomplished its purpose (and) jurisdiction should terminate." *Spangler*, 611 F.2d at 1242 (Kennedy, C.J. concurring). The perpetual relief sought by the plaintiffs is in direct conflict with these constitutional principles.

In sum, this court concludes that the purposes of the litigation as incorporated in the 1972 decree have been fully achieved. The desegregation order entered in 1972 has fully served its purpose during the "interim period" and accomplished its task of "correcting" the condition that offended the Constitution. This court found the school district unitary and terminated jurisdiction in 1977. The court's unitary finding in 1977 signified that the purposes of the litigation had been fully achieved. The dual school system had been dismantled. Moreover, the school district's continued adherence to the fundamental tenets of the Finger Plan at all grade levels through school year 1984-85 further insured that all vestiges of prior state-imposed segregation had been completely removed. Undoubtedly, after proper implementation for more than a decade, the dangers prevented by the 1972 decree have "become attenuated to a shadow." *See Jan-dal*, 433 F.2d at 305. Today, no child in Oklahoma City is denied admission to school on the basis of race. Nor is the particular school a child attends determined by race. Rather, where a child attends school in Oklahoma City today is determined on a race-neutral basis by where the child resides.

2. Substantial Demographic Change Since 1972 Requires Dissolution Of The Injunction

The Finger Plan appropriately served its purpose during the interim period when remedial adjustments were being made to dismantle the dual school system in Oklahoma City. However, even the Plan's author never intended the Plan to operate in perpetuity. Over time, demographic change in Oklahoma City rendered the "stand-alone" school feature of the Finger Plan inequitable, as is evidenced by the "whiplash" effect it had on the community. The greater the number of "stand-alone" schools, the greater the busing burden placed on young black children. More "stand-alone" schools meant fewer fifth-year centers with fewer schools located in the northeast section of Oklahoma City. With demographic change, the "stand-alone" school feature indeed produced "hardship so extreme and unexpected as to make the decree oppressive." *See Safeway*, 611 F.2d at 800.

B. Summary

When the Oklahoma City School Board adopted its 1985 student assignment plan, it was unitary; and the purpose of this litigation had been fully achieved. The same remains true today. The "substantial change in conditions" which over time resulted in the elimination of illegal discrimination and satisfied the objective of this case is precisely the change which compels dissolving the 1972 decree. As the facts and law no longer require its enforcement, the desegregation decree entered by this court in 1972 should be dissolved.

V.

WHAT ARE THE FUTURE EFFECTS OF THE K-4 PLAN?

Plaintiffs, and those similarly situated, should not fear today's decision, for the Constitution remains intact. Should the Oklahoma City School Board or any other governmental agency go astray, any person ad-

versely affected is free to return to the federal court system, and upon proof of a new constitutional violation, the court will award appropriate remedial relief.

Yet, as the court revealed previously in this decision, the Board's adoption of the 1985 student assignment plan calling for neighborhood elementary schools did not violate the Constitution. The Board adopted the plan for the purpose of avoiding the progressive inequity of the "stand-alone" school feature in the Finger Plan and enhancing academic achievement through increased parental and community involvement and pride in the public schools. The Board's motivation was legitimate, not discriminatory.

A. A Continued Unitary School System

The court views it important that when the Board adopted the neighborhood plan, a "majority-to-minority" transfer provision was provided. This allows the parent of any elementary student attending a school where their race is in the majority to obtain a transfer to a school where their race will be in the minority. This transfer option is encouraged through district-provided, cost-free transportation; and is being exercised by parents in the district. In school year 1985-86, a total of 332 parents exercised the option, the following year, a total of 181 exercised it. (Def. Ex. 108). This type of "majority-to-minority transfer option is recognized by the Supreme Court as an appropriate desegregation tool. *Swann*, 402 U.S. at 26-27. In a word, parents in Oklahoma City today have a choice. No pupil of a racial minority is excluded from any school in Oklahoma City on account of race. Thus, the original objective of this case, once achieved, continues to be met today.

It must also be remembered that the neighborhood school system is in wide use throughout the United States and has been for many years the basis of school administration. In fact, public policy in the

United States and in the state of Oklahoma favors neighborhood schools. 20 U.S.C. § 1701(A)(2); 70 O.S. § 1210.203. The recognized advantages of neighborhood schools were discussed by the Sixth Circuit Court of Appeals in *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 60 (6th Cir. 1966):

> [T]he neighborhood school system . . . is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children reaching school, economy of costs and reducing transportation needs, ease of placement and administration through the use of neutral, easily determined standards, and better home-school communication.

The evidence shows these positive aspects of neighborhood schools apply to Oklahoma City as well.

Plaintiffs assert that the neighborhood school plan recreated a dual school system that the standard is effect, not intent. The Supreme Court, however, has ruled that effect, rather than intent, is focused upon *only* in the remedial phase of the case when a court is determining whether a school board's proposed plan "is a permissible method of dismantling a dual system." *Wright v. Council of Emphoria*, 407 U.S. 451, 462 (1972); *Dayton II*, 443 U.S. at 538 ("The measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual school system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."). This court's 1977 unitary finding signifies that the Oklahoma City Board of Education had satisfied its affirmative duty to desegregate by eliminating the dual school system. Since the Board had dismantled the dual system at the time it adopted its neighborhood plan, effect does not govern over purpose as plaintiffs suggest.

B. Enhanced Academic Achievement Through the Effective Schools Program

Plaintiffs further contend that young black students cannot achieve academically in schools which are not racially balanced. A substantial amount of evidence and expert testimony was offered on this subject at the hearing, and the court concludes this assertion is without merit. Any suggestion that young blacks are intellectually inferior to young whites is contrary to empirical evidence. Socioeconomic status and the level of parental involvement, rather than the degree of racial balance, are the primary factors which impact academic achievement. (Tr. 848-49, 913-16, 1067-68, 1078, 1454, 1468). For example, Willard Elementary School in Oklahoma City is only 6.6% black, yet its students come from families with the lowest socioeconomic status in the school district. In 1985-86, Willard's overall achievement test scores were the lowest in the district. The overall level of academic achievement at each school which is 90% or more black exceeded that at Willard. (Def. Ex. 182; Tr. 927-28). Furthermore, the evidence shows that socioeconomic factors may be overcome with sound educational programs similar to the defendant Board's "Effective Schools" program. The increased level of parental involvement which came with neighborhood schools, coupled with the Board's "Effective Schools" curriculum, resulted in overall academic gains at 8 of the 10 predominantly black elementary schools exceeding the average gains made by black children nationally. (Def. Ex. 185; Tr. 933-934). More impressive, between 1985-86 and 1986-87 the gap between third grade black and white student achievement test scores was reduced by 13%. (Def. Ex. 185, p. 4) Indeed, the testimony of nationally recognized scholars shows that the Oklahoma City School District is well on its way to becoming a nationally recognized model urban school district. (Tr. 918).

Evidence of successful effective school programs is not limited to Oklahoma City. In Chicago, for example, the high school dropout rate is 65%. However, six all-black schools implementing the effective schools concept send 80-90% of all their students to college. (Tr. 1456-58). Thus, the court concludes that the racial composition of a school has absolutely no effect on the academic achievement of its students. The Oklahoma City School Board believes that all students can learn, and the evidence supports this belief. The court also notes that blacks are not being denied an integrated educational experience, for in grades 5-12 racial balance is maintained via busing.[6]

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[6] The extent of the integrated experience in grades K-12 was aptly described by Clara Luper, Youth Advisor for the NAACP since 1957 and an Oklahoma City teacher of 23 years:

p. 1420
Q. And you teach at John Marshall now?
A. Yes.

p. 1421
Q. Is the faculty at John Marshall integrated?
A. Yes.
Q. Is the staff integrated?
A. Yes.
Q. Are the facilities integrated?
A. I don't understand what you mean if the facilities are integrated.
Q. If the building itself is integrated. Student composition, the student population, is that integrated?
A. Yes.
Q. Are the extracurricular activities integrated at John Marshall?
A. We are moving toward it.
Q. Blacks and whites participate in sports and academic extracurricular activities, is that right?
. . .
A. Yes.
Q. And transportation to the school is integrated, isn't it?
A. Yes.
Q. And the same is true with the junior highs in this district.
A. Yes.

p. 1422
Q. And the middle schools?

C. Summary

It is clear from the evidence that the current Oklahoma City School Board, more so than any this court has read about in reported case law, is conscientiously oriented to its duty to operate a unitary school system. The record shows that the Board is equally committed to providing quality education and achieving academic excellence. For the plaintiffs to claim that the K-4 Plan is a step toward a dual school system is ludicrous and absurd. These words are harsh, but true. In actuality, the Board's actions, along with the testimony of Board members, point toward a future in which the Oklahoma City School System will be nationally revered for its successful efforts to provide a superior education to each pupil regardless of the student's race.

VI.

SHOULD THE FOSTER PLAN BE ADOPTED?

In this phase of the litigation, plaintiffs are asking the court to implement a new desegregation plan prepared by Dr. Gordon Foster. (Plf. Ex. 57). Dr. Foster's proposal employs techniques of pairing, clustering and busing in an effort to maintain racial balance in the school district's K-4 elementary schools. However, Dr. Foster's proposed plan affords remedial relief in addition to that provided in the Finger Plan. Under Dr. Foster's proposal, young white students in grades 1-4 would be bused for the first time in the history of Oklahoma City. Plaintiffs contend that white children should share the busing burden now because blacks carried the burden in the past. Although admirable, this concept simply does not square with principles of equity.

A. Yes.
Q. And the Fifth-Year Centers?
A. Yes.

A. The Foster Plan Is Not Necessary

In light of the unitary status of the Oklahoma City School District, the plaintiffs are precluded from seeking remedial relief in addition to that afforded through the Finger Plan. As the Supreme Court noted in *Pasadena*, 427 U.S. at 436-37:

> [H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Also, the Court of Appeals recognized that, at most, plaintiffs were limited to seeking enforcement of the Finger Plan:

> [P]laintiffs also could not expect more than the approved plan provided. When, five years later, the court determined that the implementation of the Finger Plan had resulted in unitariness in the district, that finding became final, and it, too, is binding upon the parties with equal force . . . We contrast this case with the *Spangler* line of cases in which an aggrieved party sought remedial relief in addition to the previous decree.

Dowell, 795 F.2d at 1522.

B. The Foster Plan Is Not Feasible

Even if the court would have concluded that continued remedial relief in Oklahoma City was appropriate, there are additional reasons why plaintiffs' proposal is not feasible. First, if plaintiffs' proposal were implemented, it is probable that the school district would sustain a substantial wave of white flight. Although white flight cannot be used as a justification for the failure of a board of education to comply with an order to dismantle a dual school system, *United*

States v. Scotland Neck Board of Education, 407 U.S. 484, 491 (1972); *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1438 (5th Cir. 1983), the probability of white flight may be considered by a court in solving the integration equation. *Riddick v. School Board of Norfolk*, 784 F.2d 521, 540 (45h Cir. 1986); *Parent Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 720 (2nd Cir. 1979); *Stout v. Jefferson County Board of Education*, 537 F.2d 800, 802 (5th Cir. 1976); *Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779, 794 (6th Cir. 1974). Thus, the probability of substantial white flight flowing from Dr. Foster's proposed plan would lead the court to reject it, even if this court had determined that the school district should remain under a remedial order.

In addition to the problems already noted, plaintiffs' busing proposal is not equitable. It pairs and clusters several schools which are already racially balanced. A typical example is the proposed clustering of Gatewood (29% black), Wilson (51% black) and Hawthorne (19% black). (Tr. 1377).

Additionally, the school district's superintendent, Dr. Arthur W. Steller, pointed out that if Dr. Foster's proposal were implemented it would adversely impact the school district and its recent accomplishments, in several respects. The total cost of implementing Plan A in the first year would be $7,402,913.50. For each year after that the cost would be $1,678,958.50. (Tr. 1500). During a time when the Oklahoma City School Board is confronted with substantial budget cuts, expenditures of this nature would cut directly into and adversely impact the effective schools program and retard the progress being made by students of all races.

C. Summary

Dr. Foster's proposal calls for the wholesale cross-town busing of young students in Oklahoma City. It

envisions perpetual implementation. In light of the school district's unitary status, the potential harms related to busing students at this tender age must be given serious consideration. Indeed, "[i]t is becoming increasingly doubtful that massive public transportation really accomplishes the desirable objectives sought." *Columbus*, 443 U.S. at 469 (Berger, C.J., concurring in judgment). In conclusion, Dr. Foster's busing proposal would not be acceptable to this court even if the court viewed it appropriate to retain further jurisdiction over the school district. The Foster Plan should not be adopted.

VII.

CONCLUSION

The Oklahoma City School District was declared unitary ten years ago, and it remains unitary today. After more than 25 years of litigation, it is time to return total control over the schools in Oklahoma City to its Board of Education. This court's regulatory control must not extend beyond the time required to remedy the effects of past intentional discrimination. *Milliken II*, 433 U.S. at 280-82. Today there are no vestiges of the past intentional discrimination which occurred in Oklahoma City; there are no indications that de jure segregation will again rear its ugly head in this community; and the purpose of this case has been fully achieved. The School Board's K-4 neighborhood school plan is constitutionally and educationally sound. Thus, its continued implementation will not be disturbed. The 1972 desegregation decree should be dissolved (along with any other injunctions issued before or during the Finger Plan's operation), and the court's remedial jurisdiction should be totally relinquished.

Based upon the foregoing findings of fact and conclusions of law, an appropriate Order, Judgment and Decree will be issued without unnecessary delay.

Dated this 9th day of December, 1987.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF
OKLAHOMA CITY PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 89,
OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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Counter-Statement of Question Presented for Review

A single question arises on the facts of this case:

May a school district that obeys a federal court order requiring it to implement a new student assignment plan to accomplish desegregation be permitted, consistent with the Fourteenth Amendment, to dismantle that plan, and thereby to re-create the all-black schools whose elimination was the purpose of the court order, when the uncontroverted evidence demonstrates that the conditions that made the order necessary (racial residential segregation that the court determined to have resulted from official state action including action of the school authorities) yet persist?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

No. 89-1080

THE BOARD OF EDUCATION OF
OKLAHOMA CITY PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 89,
OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The decision of the Court of Appeals, reprinted at Pet. App. 1a-113a, is now reported at 890 F.2d 1483 (10th Cir. 1989).[1]

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[1]Earlier reported opinions in this matter are found at 219 F. Supp. 427 (W.D. Okla. 1963); 244 F. Supp. 971 (W.D. Okla. 1965),

(continued...)

Statement

The Oklahoma City school district for generations maintained a racially discriminatory, dual and segregated school system.[2] In 1955 the school board eliminated separate, overlapping attendance boundaries for black and white students but because of segregated residential patterns – which the district court in this case found to have been caused by official action including the actions of school authorities[3] – the school zones which the board drew perpetuated all-black, segregated schools in the

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[1](...continued)

modified and aff'd, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); 396 U.S. 269 (1969); 307 F. Supp. 583 (W.D. Okla.), *aff'd*, 430 F.2d 865 (10th Cir. 1970); 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972); 606 F. Supp. 1548 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[2]*Dowell*, 219 F. Supp. 427, 431-34 (W.D. Okla. 1963). [Earlier reported opinions in this action are cited simply as "*Dowell*."]

[3]*Dowell*, 219 F. Supp. at 433-34; *id.*, 244 F. Supp. 971, 975-76 (W.D. Okla. 1965); *see also id.*, 677 F. Supp. 1503, 1506 (W.D. Okla. 1987), *rev'd*, 890 F.2d 1483 (10th Cir. 1989), Pet. App. 5b-6b.

"northeast quadrant" of the city.[4] In 1972, after the board failed to submit an effective plan,[5] the district court ordered the system to implement the "Finger Plan" utilizing pairing and clustering of school facilities to desegregate the public schools.[6]

In 1977 the district court "terminated" its supervisory jurisdiction but did not vacate its 1972 order, specifically noting that "the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the [Finger] Plan."[7] However, in 1984

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[4]*Dowell*, 244 F. Supp. at 975.

[5]The trial court repeatedly allowed the school board additional time to submit an effective desegregation plan. *See Dowell*, 244 F. Supp. 971 (W.D. Okla. 1965), *modified and aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); *id.*, 396 U.S. 269 (1969)(reversing delay in implementing secondary plan); *id.*, 307 F. Supp. 583 (W.D. Okla.), *aff'd*, 430 F.2d 865 (10th Cir. 1970)(approving secondary plan).

[6]*Dowell*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 2041 (1972).

[7]The 1977 order is reprinted *infra*, Appendix pp. 1a-4a.

the school board decided to return the system's elementary schools to the geographic attendance zoning system it had devised in 1955. The result was the creation of ten elementary schools having virtually all-black enrollments (each of which had been virtually all-black prior to the 1972 order and each of which had been integrated from 1972 to 1984), to which more than 40% of all black elementary students in the Oklahoma City public schools were assigned.[8]

Plaintiffs sought to reopen the litigation to challenge this elementary school resegregation. The district court denied plaintiffs' request and held the 1984 elementary attendance plan constitutional,[9] but the Court of Appeals reversed and remanded with instructions that

[8]See *Dowell*, 890 F.2d at 1511 n.5 (dissenting opinion). The eleventh virtually all-black elementary school, North Highland, was 50% black in 1972, PX 12, Tr. [of June 15-24, 1987 hearing] 30, 32.

[9]*Dowell*, 606 F. Supp. at 1557.

the trial court should consider whether the 1972 injunction should be modified or dissolved, placing the burden upon the school board to "present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the order."[10]

On remand, the school board

> assert[ed] that over time the substantial demographic changes in Oklahoma City rendered the Finger Plan inequitable and oppressive. The resulting inequity, the Board contend[ed], was the primary factor motivating its adoption of the new student assignment plan at the elementary level.[11]

The board also claimed that as a result of these changes, current residential patterns in the district no longer reflected the impact of the severe, interrelated housing and school segregation that the Finger Plan was intended

[10]*Dowell*, 795 F.2d at 1523.

[11]*Dowell*, 606 F. Supp. at 1513, Pet. App. 19b.

to neutralize.[12] These changes, the board contended, warranted the complete dissolution of injunctive relief.

The district court agreed with these contentions. It concluded that although the 1984 plan re-instituted the same attendance zones that had been used prior to the 1972 order,[13] and although it re-created the very same all-black elementary schools in the "northeast quadrant" of Oklahoma City that had existed prior to that order, nevertheless there was no re-establishment of the dual school system. The court reached this judgment by making two findings. It first "unlink[ed] the Board from existing residential segregation,"[14] holding the

[12]"Defendants' expert . . . was satisfied that the residential pattern that developed in the District since implementation of the Finger Plan was not a vestige of what had occurred thirty-five or forty years before," *Dowell*, 890 F.2d at 1487.

[13]*Dowell*, 677 F. Supp. at 1517, Pet. App. 28b.

[14]*Dowell*, 890 F.2d at 1488, Pet. App. 9a.

discriminatory acts that it had earlier recognized as the cause of pre-1972 residential racial separation[15] had become attenuated as a result of the repeal of discriminatory statutes and ordinances and the passage of fair housing legislation.[16] The court then concluded that the board's adoption of the 1984 plan was not motivated by "discriminatory intent."[17]

Turning to the question whether the injunction should be dissolved or modified, the district court held that the purposes of the 1972 order had been achieved since

> the school district's continued adherence to the fundamental tenets of the Finger Plan at all grade levels through school year 1984-85 further insured

[15]See *supra* note 3.

[16]*Dowell*, 677 F. Supp. at 1511, Pet. App. 15b.

[17]*Dowell*, 677 F. Supp. at 1516, Pet. App. 25b.

> that all vestiges of prior state-imposed segregation had been completely removed[18]

and since

> *the Oklahoma City Board of Education is not responsible for the present state of residential segregation in Oklahoma City.*[19]

The court below again reversed. It held that the district court "clearly erred in its findings of fact and consequent legal determinations":

> [A]lthough there is evidence to facially support the district court's findings, *on the entire evidence* we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Because the court failed to address or distinguish plaintiffs' contrary evidence, and because the court cast the evidence on which it relied in a form to provide an answer to the single question of discriminatory intent, we are convinced that the basis on which the court fashioned dissolution of the injunction was flawed.[20]

The starting point for the Court of Appeals' analysis was its recognition that, although the district court used the term "unitary" to describe the Oklahoma City school system in 1977 (at a time when the Finger Plan was still being fully implemented), it had not at that time vacated the 1972 injunction but simply terminated its active jurisdiction over the case.[21] In those

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[18]*Dowell*, 677 F. Supp. at 1522, Pet. App. 38b.

[19]*Dowell*, 677 F. Supp. at 1521, Pet. App. 36b [emphasis in original].

[20]*Dowell*, 890 F.2d at 1504, Pet. App. 41a [emphasis in original]. At the beginning of its opinion (890 F.2d at 1488, Pet. App. 10a-11a), the panel majority enunciated the standard of review which it was applying:

> [O]ur review focuses on whether the district court abused its discretion in granting the Board's motion to dissolve the injunction and denying plaintiffs' motion to modify the relief. On appeal we will not disturb the district court's determination except for an abuse of discretion. *Securities and Exch. Comm'n v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677 (10th Cir. 1988). The district court's exercise of discretion, however, must be tethered to legal principles and substantial facts in the record. *Evans v. Buchanan*, 582 F.2d 750, 760 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

[21]The district court's action was thus similar to measures adopted by other courts to provide a greater degree of discretion for

(continued...)

circumstances, as the Court of Appeals had previously held, the school board was entitled to dissolution of injunctive relief only upon a showing that "the law or the

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[21](...continued)

local school boards while retaining protections for the rights of plaintiffs. *E.g.*, *Keyes v. School District No. 1*, 670 F. Supp. 1513, 1515 (D. Colo. 1987)(court "recognized the need for modification of the existing court orders to relax court control and give the defendants greater freedom to respond to changing circumstances and developing needs in the educational system"), *aff'd*, Nos. 85-2814 & 87-2634 (10th Cir. January 30, 1990); *Swann v. Charlotte-Mecklenburg Board of Education*, Civ. No. 1974 (W.D.N.C. July 11, 1975), slip op. at 2 ("This case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed. The court does not anticipate any action by the defendants to justify a re-opening; does not anticipate any motion by plaintiffs to re-open; and does not intend lightly to grant any such motion if made. This order intends therefore to close the file; to leave the constitutional operation of the schools to the Board, which assumed that burden after the latest election; and to express again a deep appreciation to the Board members, community leaders, school administrators, teachers and parents who have made it possible to end this litigation").

The 1977 order in this case included no finding that all vestiges of prior discrimination had been completely eliminated. It stated only that "substantial compliance with the constitutional requirements has been achieved," adding that the court did not expect that relinquishing active jurisdiction "will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years" of the litigation." *See infra*, pp. 1a-4a.

underlying facts have so changed that the dangers prevented by the injunction 'have become attenuated to a shadow."' *Dowell*, 890 F.2d at 1489-92 and 795 F.2d at 1521, both citing *United States v. Swift & Company*, 286 U.S. 106 (1932).

Although there were changed conditions,[22] the court below concluded that they did not warrant dissolution of all injunctive relief:

> The issue then becomes whether the Board's action in response to the changed conditions has the effect of making the District "*un*-unitary" by reviving the effects of past discrimination. . . . [T]he evidence indicates the Board's implementation of a "racially neutral" neighborhood student assignment plan has the effect of reviving those conditions that necessitated a remedy in the first instance. Under these circumstances the expedient of finding unitariness does not erase the record or represent that substantial change in the law or facts to warrant overlooking the effect of the Board's actions.[23]

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[22]*Dowell*, 890 F.2d at 1498, Pet. App. 30a.

[23]*Dowell*, 890 F.2d at 1499, Pet. App. 31a-32a.

Instead, the case was remanded with instructions to modify prior decrees in light of the changed circumstances and of the objectives they were intended to achieve.[24] It is that determination which the board now asks this Court to review.

[24]*Dowell*, 890 F.2d at 1504-06, Pet. App. 41a-45a.

REASONS FOR DENYING THE WRIT

I. THE APPARENT CONFLICT AMONG THE CIRCUITS REFLECTS FACTUAL DIFFERENCES LIMITED TO A FEW CASES AND DOES NOT WARRANT REVIEW BY THIS COURT

This matter, *Riddick v. School Board*,[25] and *United States v. Overton*[26] are *sui generis*, as we explain below. Since the time in the mid-1980's when they were initially litigated, their unique circumstances have not recurred in other suits. For this reason, any apparent conflict among the Courts of Appeals in these decisions does not warrant review by this Court, especially since there is broad consensus in the lower courts on the underlying substantive principles.

[25]784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[26]834 F.2d 1171 (5th Cir. 1987).

In each of the three enumerated cases, a federal district court had, at some point in the past, used the term "unitary" to describe the school district involved.[27] In each of the cases, the school system in question thereafter dismantled, in its elementary grades, the desegregation plan that it had previously been ordered to implement, and that had made it possible even to consider application of the term "unitary" to its public schools. The issue presented to the federal courts in the renewed litigation which followed was whether such dismantling was consistent with the Fourteenth Amendment obligations of school authorities that had originally prompted the issuance of desegregation injunctions.

The Courts of Appeals reached different results in the cases. In *Overton* and *Riddick* the parties' consent to the "unitary" finding was treated as controlling and as the equivalent of a judgment that all vestiges and effects of the school authorities' prior discriminatory conduct had

[27] In *Riddick* the finding was embodied in a consent decree dismissing the predecessor school desegregation action "with leave to any party to reinstate this action for good cause shown." *See* 784 F.2d at 525. In *Overton* the parties entered into a consent decree providing that after three years, unless there was objection the school district "shall be declared to be a unitary school system and this case shall be dismissed." *See* 834 F.2d at 1171. (There was such an objection but it was withdrawn pursuant to a further stipulation, thus triggering dismissal pursuant to the consent decree when the stipulation was effectuated. *Id.* at 1173-74.) In *Dowell*, as we have noted, the word was used in one sentence of a 1977 order terminating active jurisdiction but not referring to or vacating prior injunctive decrees.

In the only other arguably similar case of which Respondents are aware, *Lee v. Talladega County Board of Education*, No. 88-7471 (11th Cir. argued August 9, 1989), the district court in 1985 endorsed as "Approved" and "Entered" a Joint Stipulation of Dismissal signed by all parties. The Joint Stipulation incorporated by explicit reference a resolution of the school board in which it committed itself to continue to comply with all prior court orders in the case. On the same date, the district court entered a separate Judgment and Order dismissing the case "in view of" the Stipulation and reciting that the district had achieved "unitary status." Neither the Joint Stipulation nor the Judgment and Order vacated or dissolved prior orders. The present appeal in that matter turns on construction of the Order, the Stipulation and the incorporated resolution.

been completely eliminated.[28] In *Dowell* the Court of Appeals did not view the "unitary" phrasing of the 1977 order in the same light; although the plaintiffs had not appealed the entry of the 1977 order and it was therefore to be given *res judicata* effect,[29] the Court of Appeals found the failure of the district court to have explicitly vacated its prior decree in 1977 to be quite significant.[30] Since the 1972 order remained in effect, the Court held, it could subsequently be dissolved only upon

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[28]In *Riddick* the consent order recited "that racial discrimination through official action has been eliminated from the system, and that the Norfolk School System is now 'unitary,'" *see* 784 F.2d at 521. In *Overton* the consent decree embodied the minimum three-year period of retained jurisdiction, and the opportunity for plaintiffs to make objection and present evidence of continued vestiges of discrimination counter-indicating dismissal, that the Fifth Circuit had previously established as the proper procedure to be followed in ending school desegregation suits. *See* 834 F.2d at 1175 n.12, 1177 n.20 & accompanying text.

[29]*Dowell*, 795 F.2d at 1522.

[30]As noted, the district court had stated in 1977 that it did not expect its termination of active jurisdiction to result in any dismantling of the Finger Plan.

a showing, consistent with the traditional equity standards enunciated in *Swift*, that the conditions which gave rise to its entry in 1972 had so changed that its continuance was no longer necessary to ensure the constitutional rights of the plaintiffs for whose protection it had issued.

Petitioners advance a conflict among the Circuits with respect to the significance of a "unitary" finding and with respect to the applicability of the *Swift* standard as matters meriting the attention of this Court. We respectfully submit, however, that the *judgments* in the three cases are not mutually inconsistent, and that there is now, in fact, wide agreement among the lower federal courts on the governing legal principles in this area. Accordingly, discretionary review of the decision below is unnecessary.

In *Riddick* and *Overton* the plaintiffs' consent (or withdrawal of objections) to determinations that the

effects of prior discrimination had been eliminated was held controlling, as previously noted. In *Dowell* the Court of Appeals was unable to harmonize the district court's incidental use of the term "unitary" with its failure to dissolve the prior injunctive relief, and for this reason held that the injunction remained in force and could only be vacated on the basis of the traditional *Swift* showing.

While the *Overton* court, in *dictum*,[31] expressed disagreement with *Dowell*, that disagreement turned upon the *Overton* panel's assumption that the 1977 order in the instant case was "a final declaration that the school

[31]The first reason given by the Court of Appeals in *Overton* for upholding the district court's refusal to enforce the prior consent decree was that the decree "expired by its own terms." 834 F.2d at 1174. Since that was a completely sufficient basis on which to affirm the district court's judgment, the subsequent discussion of *Riddick* and *Dowell* in the opinion was unnecessary and is *dictum* -- especially since the panel's interpretation of the consent decree's terms avoided the need to decide issues of constitutional magnitude concerning the scope and duration of the remedy for operating a dual school system. *See United States v. Henry*, 709 F.2d 298, 310 (5th Cir. 1983)("It is well settled . . . that a federal court should not reach a constitutional question if the case may be disposed of on statutory or other nonconstitutional grounds").

district [was] unitary."[32] On strikingly similar facts, however, the author of the *Overton* opinion has recognized that the mere usage of the word "unitary" does not always constitute such a "final declaration that the school district is unitary." *See Monteilh v. St. Landry Parish School Board*, 845 F.2d 625, 629 (5th Cir. 1988)("because our procedures had not been followed before the court in 1971 declared St. Landry to be unitary, we find that neither the district court nor the panel affirming its order intended to declare that the district was unitary, in the sense of having eliminated all vestiges of past discrimination").

The same approach, involving fact-bound analysis of the history of an action rather than the attribution of talismanic significance to the word "unitary," has been taken in numerous cases decided by several of the

[32]*See* 834 F.2d at 1174.

federal judicial Circuits.[33] As the Court of Appeals for the Eleventh Circuit aptly summarized the situation:

> Some confusion has been generated by the failure to adequately distinguish the definition of a "unitary" school system from that of a school district which has achieved "unitary status." As used in this opinion, a unitary school system is one which has not operated segregated schools as proscribed by cases such as *Swann* and *Green* for a period of several years. A school system which has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures.[34]

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[33]*E.g.*, *School Board of Richmond v. Baliles*, 829 F.2d 1308, 1311 n.1 (4th Cir. 1987)("We recognize that there is dictum in our 1972 opinion stating that this was a unitary system. That issue, however, was not properly before the appeals court in 1972 and, as explained by the district court in the instant litigation, the facts in 1972 might not have supported a finding that RPS had achieved unitary status at that time"); *United States v. Lawrence County School District*, 799 F.2d 1031, 1037 (5th Cir. 1986)("The use of the word 'unitary' in the *Alexander* opinion, like its repetition in the 1974 order, did not imply a judicial determination that the school system had finally and fully eliminated all vestiges of *de jure* segregation"); *Pitts v. Freeman*, 755 F.2d 1423, 1426 (11th Cir. 1985)("As the defendants suggest, it is possible that the district court did not intend its use of the word 'unitary' to be equated with the unitary status that requires dismissal of the action").

[34]*Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985). What had always been

(continued...)

Thus, the conflict between *Riddick* and *Overton*, on the one hand, and the instant case, on the other, turns not upon the consequences of a true determination of "unitary status" but upon the differing interpretations given by the Courts of Appeals in each case to the earlier orders in which the term "unitary" was used.

No legal issue warranting the grant of *certiorari* here is presented by such case-specific differences in interpretation of lower court orders. Since the Courts of Appeals' 1986 and 1987 decisions in the three cases, no other school systems have sought to dismantle their desegregation plans. And there is virtual unanimity

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[34](...continued)

clear was that *premature dismissal* of cases, before it was clear that plans had been effective and the vestiges of discrimination had been eradicated, was improper. *Raney v. Board of Education of Gould*, 391 U.S. 443, 449 (1968); *Youngblood v. Board of Public Instruction of Bay County*, 448 F.2d 770 (5th Cir. 1971); *see also Lemon v. Bossier Parish School Board*, 444 F.2d 1400, 1401 (5th Cir. 1970).

among the lower federal courts today[35] about the

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[35]*See Keyes v. School District No. 1*, Nos. 85-2814 & 87-2364 (10th Cir. January 30, 1990), slip op. at 13-14 ("This court has defined 'unitary' as the elimination of invidious discrimination and the performance of every reasonable effort to eliminate the various effects of past discrimination"); *Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d 945, 951-52 (11th Cir. 1989)(Supreme Court "cases make clear that no previously segregated school system can be declared to have achieved unitary status as long as there is continued segregation . . . . A declaration of unitary status is also inappropriate when the evidence shows that school authorities have not consistently acted in good faith to implement the objectives of the plan"); *School Board of Richmond v. Baliles*, 829 F.2d at 1312 (affirming district court finding of unitary status after considering evidence on factors "other than those relating to student body composition or school operations" that parties had urged district court to consider in addition to the six factors enumerated in *Green*); *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987)("Unitary status is not simply a mathematical construction. One non-quantitative factor of particular significance is whether the school defendants have a sufficiently well-established history of good faith in both the operation of the educational system in general and the implementation of the court's student assignment orders in particular to indicate that further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention"); *United States v. Lawrence County School District*, 799 F.2d at 1037 ("The use of the word 'unitary' in the *Alexander* opinion, like its repetition in the 1974 order, did not imply a judicial determination that the school system had finally and fully eliminated all vestiges of *de jure* segregation . . . Because the potential consequences of a judicial declaration that a school system has become unitary are significant, this court has required district courts to follow certain procedures before declaring a school system unitary"); *United States v. Texas Education Agency*, 647 F.2d 504, 508-09 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

underlying *substantive* principle: that a school district which had been made subject to a desegregation order should be found to have attained "unitary status," entitling it to a dismissal, only a careful hearing and review of all aspects of its operations to insure that all vestiges of prior discrimination have been extirpated.[36] In light of that understanding, and of the collateral consequences which have, after *Riddick*, flowed from a "unitary" finding, the label is no longer lightly applied to a district, and determinations of "unitariness" are often contested and are subject to careful scrutiny.[37]

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[36]Petitioners do not contest that standard; rather, they contend that they meet it. The court below overturned the district court's finding that the school system was "unitary" after implementation of the elementary plan adopted in 1984 as "clearly erroneous," a matter we address *infra* in Argument II.

[37]*See, e.g., Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d at 953 (reversing district court's "unitariness" finding as clearly erroneous); *Keyes v. School District No. 1*, Nos. 85-2814 & 87-2634 (10th Cir. January 30, 1990)(affirming finding of district court

(continued...)

Nor does any meritorious issue arise from the articulation, by the court below, of the *Swift* standard to govern dissolution of school desegregation decrees.[38] A proper finding of "unitary status," signifying that all vestiges of prior discrimination have been eliminated, by definition meets the *Swift* standard because it encompasses a determination that there are no lingering effects of the prior violation that might cause its recurrence if injunctive relief is vacated. The *Swift* standard thus does not extend "a federal court's

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[37](...continued)

that district was not "unitary" as to student assignments), *aff'g* 609 F. Supp. 1491 (D. Colo. 1985); *United States v. Texas [San Felipe del Rio Consolidated School District]*, No. 89-1304 (5th Cir. December 6, 1989)[unpublished](affirming district court finding that school system had achieved unitary status).

[38]The Tenth Circuit has approved *modification* of a decree based on criteria other than the *Swift* standard. *Keyes v. School District No. 1*, Nos. 85-2814 & 87-2634 (10th Cir. January 30, 1990), slip op. at 22 (endorsing "interim decree" as "commendable attempt to give the board more freedom to act within the confines of the law"), *aff'g* 670 F. Supp. 1513 (D. Colo. 1987).

regulatory control of [public school] systems . . . beyond the time required to remedy the effects of past intentional discrimination," *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring).[39]

II. THE COURT BELOW PROPERLY APPLIED THE "CLEARLY ERRONEOUS" RULE

Petitioners suggest that the decision of the court below conflicts with the ruling in *Anderson v. Bessemer City*, 470 U.S. 564 (1985) and misapplies the "clearly erroneous" rule. However, the features of the Court of Appeals' analysis in *Anderson* which led this Court to

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[39]In *Spangler*, "the evidence presented to the district court in support of the motion for termination of jurisdiction showed that the effects of the Board's pre-1970 discrimination have been eliminated," *id.* at 1243 (Kennedy, J., concurring). Unlike in the present case, the district court in *Spangler* had never made a finding that the school board's discriminatory student assignment and transfer practices had contributed to racial residential segregation in the school district. *See Spangler*, 311 F. Supp. 501, 507-13 (C.D. Cal. 1970).

grant review and to reverse the ruling in that case are not present in the instant matter.

To begin with, Petitioners are incorrect in their assertion that the court below "struck down the district court's intent finding" (Pet. 25). Rather the court examined the evidence "to decide if the district court correctly found the Plan maintained unitariness[40] in student assignments" and "on this basis . . . conclude[d that] the district court clearly erred in its findings of fact and consequent legal determinations."[41] The inquiry conducted by the court below was consistent with its application of the *Swift* standard to the question whether

[40]"A declaration that a school has achieved unitary status is a finding of fact subject to review under the clearly erroneous standard. *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. Unit A 1981), *cert. denied*, 454 U.S. 1143 (1982); *accord Riddick v. School Bd.*, 784 F.2d 521, 533 (4th Cir. 1986)." *Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d at 952 n.3.

[41]890 F.2d at 1503-04, Pet. App. 40a-41a.

the injunction should have been dissolved by the district court in 1987 and focused on the question whether vestiges of the prior discrimination remained intact.[42]

Unlike *Anderson*, where the Court of Appeals effectively substituted its own credibility determination for that of the district court in intepreting the testimony of a witness,[43] or drew a different inference than the district court from the subsidiary facts on which the district court relied,[44] here the panel majority found the district court's "unitariness" finding wanting because it was based upon an incomplete view of the *uncontroverted facts* established by the record and because it was substantially shaped by

[42]*See Dowell*, 890 F.2d at 1493 n.19 ("the question of continued unitariness of the District . . . was the key factual controversy in this case. . . . Whether the District was unitary before circumstances changed is irrelevant to whether the decree should be amended or vacated. Indeed, whether the District remains unitary in light of changed circumstances is a wholly different question").

[43]*Anderson*, 470 U.S. at 577-79.

[44]*Id.* at 576-77.

the lower court's view that controlling legal significance was to be accorded the board's intent in adopting the 1984 plan.[45] This holding by the majority below is unexceptionable. *Dayton Board of Education v. Brinkman* [*Dayton II*], 443 U.S. 526, 534-37 (1979).

Petitioners and the dissenting member of the panel fundamentally mischaracterize the basis of the ruling below in suggesting that the majority disagreed with the district court's choice between "two permissible views of the evidence."[46] That is not what the panel majority meant by its statement that "there is evidence to *facially* support the district court's findings."[47] When that language is read in the context of the remainder of the sentence in which it appears, and of the following textual

[45] *See Dowell*, 890 F.2d at 1503-04, Pet. App. 41a.

[46] Petition at 25, citing *Anderson*, 470 U.S. at 574.

[47] *Dowell*, 890 F.2d at 1504, Pet. App. 41a [emphasis added].

sentence,[48] the meaning is evident: a *selective* view of the record evidence, as recited and referenced in the district court's opinion was not antithetical to its finding, but considering the "*entire evidence*," the finding was clearly erroneous. No question warranting the grant of *certiorari* is raised by the holding of the court below.

III. ON THE FACTS OF THIS CASE, THE JUDGMENT BELOW MUST BE AFFIRMED BECAUSE THE BOARD'S PUPIL ASSIGNMENT PLAN PERPETUATES THE RACIALLY DISCRIMINATORY EFFECTS OF THE DUAL SYSTEM

Even if the legal issues raised by Petitioners appeared to be more significant than they are, this case would be an inappropriate vehicle in which to explore them. The record evidence in this action compels the conclusion that the school board's 1984 elementary-grade

[48] The passage is set out *supra* at pp. 8-9.

pupil assignment plan, re-imposing pre-1972 geographic attendance zones, perpetuates the racially discriminatory effects of the dual school system whose elimination is the goal of this lawsuit. Under these circumstances, the district court's finding of "unitariness" is inconsistent with this Court's school desegregation jurisprudence from *Brown*[49] to *Swann*,[50] *Keyes*,[51] and *Columbus*.[52]

A. The ten virtually all-black schools reestablished by the school board's 1984 plan are the same schools that were identified by the district court in 1972 as "substantially disproportionate in their racial composition," as not having "lost their racial identity" and as indicating

[49]*Brown v. Board of Education*, 347 U.S. 483 (1954); *id.*, 349 U.S. 294 (1955).

[50]*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[51]*Keyes v. School District No. 1*, 413 U.S. 189 (1973).

[52]*Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

that "the dual system of the School District remains unaffected."[53] These and other schools for black children that were operated under the dual system were "centrally located in the Negro section of Oklahoma City, comprising generally the central east section of the city."[54] Thus the 1984 plan reestablished the pattern of *de jure* segregation in the same place and by the same method that existed prior to the district court's 1972 order.[55] It is utterly illogical and at war with the principles of the *Brown* decision to permit a school district, that for generations maintained a racially dual school system, to revert to the same method of operating

[53]*Dowell*, 338 F. Supp. at 1260, 1265. [Harmony Elementary School was renamed King Elementary School in 1974-75.]

[54]*Dowell*, 219 F. Supp. at 433-34. *See Swann*, 402 U.S. at 21.

[55]The present case is therefore distinguishable from *Riddick*, in which the new plan's "attendance zones were gerrymandered so as to achieve maximum racial integration," 784 F.2d at 527.

virtually all-black schools built in pursuance of that dual school system.

It is one thing to say, as this Court did in *Swann*, that when a district court has required implementation of an effective desegregation plan, further modification by the court should not be necessary "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools."[56] It is quite another to read this language, as do Petitioners, to insulate school boards completely from any responsibility for resegregation that accompanies deliberate board action dismantling that plan. *See Pasadena Board of Education v. Spangler*, 427

[56]402 U.S. at 32.

U.S. 424, 435-36 (1976).[57] Indeed, this Court's decisions have explicitly charged school boards and district courts with the responsibility for avoiding resegregative actions: In *Swann*, the Court referred to "the classic pattern of building schools specifically intended for Negro or white students" as a "factor of great weight"; and cautioned that in remedying the constitutional violation of official segregation,

[57]In *Pasadena*, this Court said:

> There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants. . . . [A] quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools. But as these shifts were not attributed to any segregative actions on the part of the petitioners, we think this case comes squarely within the sort of situation foreseen in *Swann*.

Accord Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987)(vacating order under which "school defendants will be required for an indefinite period to *maintain* specific racial mixes in the city's schools, much like the balances they have been required to *achieve* during the 12 years in which the district court actively controlled the desegregation process" by altering assignments each year to attain targeted enrollment ratios, *id.* at 317 n.3).

> it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system.[58]

And in *Dayton II*, the Court repeated that school boards that previously operated dual school systems had "an affirmative responsibility to see that *pupil assignment policies* and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'"[59]

The court below faithfully applied the teaching of this Court's decisions in refusing to endorse the board's resegregative 1984 elementary school plan, and review by this Court of its determination is unnecessary.

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[58]402 U.S. at 21.

[59]443 U.S. at 538 (emphasis added and citation omitted).

B. As if recognizing these principles, Petitioners and the district court[60] sought to establish that Oklahoma City school officials' past discrimination had "become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention."[61] *See* Petition at 9. As this Court framed the inquiry in *Keyes*, 413 U.S. at 211:

> [A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove [past] segregative intent, it can rebut the *prima facie* case only by showing that its past segregative acts did not create or contribute to the current

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[60]Except for the addition of footnote 4, Respondents are aware of no material differences between Petitioners' Proposed Findings of Fact and Conclusions of Law submitted to the district court on September 29, 1987 and the Memorandum Opinion of the trial court.

[61]*Dowell*, 677 F. Supp. at 1513, Pet. App. 18b, *quoting Keyes*, 413 U.S. at 211.

> segregated condition of the [virtually all-black] schools.

The district court found that although racially differentiated residential patterns in Oklahoma City originally reflected "past governmental barriers," some blacks had moved into formerly all-white census tracts after 1960, demonstrating the "removal of past governmental barriers."[62] The court then determined that the continuing virtually all-black character of the "northeast quadrant" of the city was attributable to the exercise of "personal preference" by white families, who declined to move into the area.[63] It concluded on this basis that the school board had in no way "caused or contributed to the patterns of the residential segregation which presently exist in areas of Oklahoma City," and

[62] *Dowell*, 677 F. Supp. at 1506-11, Pet. App. 5b-15b.

[63] *Dowell*, 677 F. Supp. at 1511-12, Pet. App. 15b-17b.

that the board's prior segregative acts had become too attenuated to hold the board responsible for the virtually all-black enrollments at ten elementary schools under the 1984 plan.[64]

The district court's critical subsidiary fact-finding about the nature and cause of the current virtually all-black demography of the "northeast quadrant" was based entirely upon the testimony of one witness called by the school board, Dr. William Clark.[65] However, the court's finding is inconsistent with the testimony of Dr. Clark, who recognized that what he termed "white preference" did not exist in a vacuum but could be overlaid upon a pattern of residential demography rooted in discrimination:

[64] *Dowell*, 677 F. Supp. at 1512-13, Pet. App. 17b-18b.

[65] *See* 677 F. Supp. at 1511-12, Pet. App. 15b-17b.

Q. So that we -- is it your opinion that one would not expect, based on those surveys and your knowledge and the opinions you have expressed, that whites would move into the established black residential areas in Oklahoma City after 1950 or 1960, whatever point we want to take and look at the areas of concentrations?

A. Generally, that's correct.

Q. And does it not therefore follow that, to the extent that past discrimination was a factor in establishing concentrated minority residential areas, that those areas are unlikely to change because of the antipathy of whites to moving in unless and until their black residents move somewhere else?

A. I think that you would have to agree with that, given what I've testified. Yes.

Tr. [June 15, 1987] 106.

This evidence from Dr. Clark was uncontradicted, and it amply portrays the continuing contribution of the school board's and other official bodies' discriminatory acts to the current residential and elementary school demography of the northeast quadrant. The court below

was therefore correct in applying the teaching of *Swann* to conclude that the 1984 plan "fail[ed] to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artifical racial separation."[66] Whatever the case may be with respect to other jurisdictions where no findings of residential impact were ever made,[67] on this record the continuing responsibility of the school board for the one-race enrollments of "northeast quadrant" elementary schools is beyond dispute, and the judgment below is correct.

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[66] *Dowell*, 890 F.2d at 1503, Pet. App. 40a, *quoting Swann*, 402 U.S. at 28.

[67] See, *e.g.*, *supra* note 39.

Conclusion

For the foregoing reasons, Respondents respectfully pray that the writ be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-9452

ROBERT L. DOWELL, ETC., *et al.*,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE
OKLAHOMA CITY PUBLIC SCHOOLS, ETC., *et al.*,

Defendants.

[Filed Jan. 18, 1977]

ORDER TERMINATING CASE

There is now pending before the Court a Motion by the defendant to close the case. A hearing has been conducted by the Court to receive the evidence of both plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools.

The Court has carefully reviewed this evidence and all of the reports it has received from the defendant and the Biracial Committee since the inception February 1, 1972 of "A New Plan of Unification for the Oklahoma City Public School System," commonly known as the Finger Plan. The Court has concluded that this was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.

Constitutional principles so bitterly contested by former members of the Board have now become a part of the fabric of the present school administration. The only standard ever imposed by the Court has been obedience to the Constitution. The School Board, as now constituted, has manifested the desire and intent to follow the law. The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimina-

tion so corrosive of the human spirit and so plainly forbidden by the Constitution.

ACCORDINGLY, IT IS ORDERED:

1. The Biracial Committee established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

Dated this 18th day of January, 1977.

/s/ Luther Bohanon
United States District Judge

Supreme Court, U.S.
FILED
MAR 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

VS.

ROBERT L. DOWELL, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

The presence of a significant dispute between the Tenth, Fifth and Fourth Circuits on the aftereffect of a unitary declaration is widely documented in scholarly commentary and even acknowledged by the Tenth and Fifth Circuits. Respondent's position that a true conflict does not exist is premised on the incorrect notion that something less than a "true determination of

'unitary status' " was reached when the district court terminated this case in 1977. Brief in Opposition at 21.

It is important to remember that the district court's approval of the Finger Plan in 1972 was a full and complete remedy. It was not a "step at a time" plan by definition incomplete at inception, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435 (1976). Rather, it was a comprehensive plan which the district court found would create a "unitary system" and remain in place "until it [was] clear that disestablishment of the dual system was complete." *Dowell v. Board of Education of Oklahoma City Public Schools*, 338 F. Supp. 1256, 1271 (W.D. Okl.), *aff'd.*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). It is thus the law of this case that the Finger Plan established a racially neutral and constitutional method of student assignment. *See e.g., Spangler v. Pasadena City Board of Education*, 611 F. 2d 1239 (9th Cir. 1979) (Kennedy, J. concurring).

Several years later the school board filed a motion to close the case alleging it "[had] eliminated all *vestiges* of state-imposed racial discrimination in its school system, and [was] operating a *unitary* school system." *E.g., Dowell*, 606 F. Supp. 1548, 1551 (W.D. Okl. 1985) (emphasis added). Plaintiffs filed a response opposing the board's motion. After proper notice, the district court conducted a hearing "to receive the evidence of both the plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools." Brief in Opposition, App.1a. The court "carefully reviewed this evidence and all of the reports it ha[d] received from the defendant and the Biracial Committee since the inception ... of ... the Finger Plan." *Id.* at 2a.

Following the evidentiary hearing, the court entered an order on January 18, 1977, finding that the Finger Plan "was indeed a plan that worked and that substantial compliance with constitutional requirements ha[d] been achieved." *Id.* The court found that a "unitary system" had been "slowly and painfully accomplished over the 16 years during which the cause ha[d] been pending." *Id.* "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races," the court said, "the board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of the court" *Id.* at 3a. The "Order Terminating [the] Case" dissolved the Biracial Committee and "terminated" all further "jurisdiction" in the case. *Id.* at 4a. Therefore, contrary to respondent's position, Brief in Opposition at 23, the district court in *Dowell* did find "unitary status" had been achieved "only [after] a careful hearing and review of all aspects of [the board's] operations to insure that all vestiges of prior discrimination ha[d] been extirpated."

More importantly, plaintiffs did *not* appeal any part of the "Order Terminating Case." The unitary declaration thus became final. Eight years later, when respondents sought to collaterally attack it in their challenge to the K-4 neighborhood school plan, the district court found it preclusive:

> ... [T] his court's finding in 1977 that a *unitary system* had been achieved by the Oklahoma City Public Schools is *res judicata* as to those who were then parties to this action ... There has been no showing in this case that the

> original plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present [respondents] are, therefore *collaterally estopped* from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977 . . .

Dowell, 606 F. Supp. 1548, 1555 (W.D. Okl. 1985) (emphasis added).

In their zeal to attempt to distinguish this case from *Riddick* and *Overton*, respondents have palpably misstated the court of appeals' view on the original unitary finding in *Dowell*. The court did not simply view the unitary finding as a "lightly applied" label, Brief in Opposition at 23, without significance. Rather, the court of appeals *agreed* with the district court that the school district achieved unitariness in 1977 and that the finding was preclusive:

> When, five years later, the court determined that the implementation of the Finger Plan had resulted in *unitariness* within the district, that finding became *final*, and it, too, is *binding* upon the parties with equal force . . . Thus, . . . the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977 . . .

Dowell, 795 F. 2d 1516, 1522 (10th Cir.), *cert. denied*, 107 S.Ct. 420 (1986) (emphasis added).

Respondent's position that no conflict is present because "[i]n *Riddick* and *Overton* the parties' consent to the 'unitary' finding was treated as controlling," Brief in Opposition at 15, 17-18, is likewise incorrect. In *Riddick* the Fourth Circuit actually ruled that since the district court "made findings on the merits of the plaintiffs' claims for relief, the order [wa]s not a consent order in settlement of a suit but [wa]s an order on the merits . . ." which became "final" and preclusive with respect to the issue of unitariness. *Riddick v. School Board of City of Norfolk*, 784 F. 2d 521, 530 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986). Similarly, in *Overton* the Fifth Circuit recognized that "the district court entered an order declaring AISD unitary and dismissing the case." *U.S. v. Overton*, 834 F. 2d 1171, 1174 (5th Cir. 1987). This order, the court held, constituted "a final declaration that the school district [wa]s unitary." *Id.*

Therefore, it is conclusive that a final declaration of unitary status was present in *Dowell*, *Riddick*, and *Overton*, and that respondents' attempt to distinguish these cases on this basis is completely misdirected. The conflict between the circuits was born when *Dowell* reached conclusions opposite to those reached in *Riddick* with respect to the *consequences* of a final declaration of unitary status.

The Fourth Circuit in *Riddick* concluded the final declaration of unitary status meant the board was "no longer under court order," 784 F. 2d at 525, and that it "returned control of the city's schools to the school board," *Id.* at 538. Thus, those challenging the neighborhood school plan shouldered the burden to prove the school board adopted the plan "with an intent to discriminate on the basis of race." *Id.* at 534.

In *Dowell*, the Tenth Circuit could not distinguish *Riddick*. It stated *Riddick* "seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that

effect." 795 F. 2d at 1520 n.3 (1986). The Tenth Circuit therefore concluded that "the Fourth Circuit [in *Riddick*] has taken a *different* view with which we *cannot* agree, . . . A finding of *unitariness* may lead to many other reasonable conclusions, but it *cannot* divest a court of its jurisdiction." *Id.* (emphasis added). Notwithstanding the final declaration of unitary status, the *Dowell* court placed the burden of proof on the school board to justify the neighborhood school plan's racially disproportionate "effect."

The court of appeals in *Overton* could not distinguish the contrary rulings flowing from *Riddick* and *Dowell*. The Fifth Circuit thus recognized that the "Fourth Circuit reached the *opposite* conclusion [of *Dowell*]. . .in *Riddick* . . .," 834 F.2d at 1174 (1987). It then piercingly rejected *Dowell's* approach: "*Dowell's* description of our jurisprudence is *incorrect*," *Id.* at 1175 (emphasis added); "We see *Dowell's* effort to declare a school district to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness," *Id.* at 1176; "In sum, the idea that a school district can be declared unitary and yet be answerable to federal courts for failure to abide by desegregation plans, regardless of segregative purpose, is at *war* with itself," *Id.* at 117 (emphasis added). The foregoing critique is hardly "*dictum*," Brief in Opposition at 18 n. 31. *Overton* found the decree existing in Austin, Texas was unenforceable for "related reasons." *Id.* at 1174. While it is true the court recognized the decree "expired by its own terms," the court emphasized the important issue was that the decree could not "lie alongside a final declaration that the school district [wa]s unitary." *Id.*

The Tenth Circuit did not simply sit still when criticized by the *Overton* panel. In response, it reiterated that a significant substantive dispute existed among the circuits, *Dowell*, Pet. App. at 16a-17a (1989) ("nor in our view does a finding of unitariness mandate later dissolution of the decree. . .; *Contra. . .Overton*; . . . *Riddick*. . ."), and then beset the Fifth Circuit, *Id.* at 17a n. 17 (". . .*Overton*, 834 F.2d at 1171, *confuses* a trial court's jurisdiction to enforce its mandatory orders with the concept of finality.") (emphasis added).

This, of course, is not surprising because the Tenth Circuit believes that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate." *Dowell*, Pet. App at 13a. Indeed, the Tenth Circuit is of the view that the district court's "jurisdiction extends beyond the termination of the wrongdoing." *Id.* Thus, "[t]he condition that eventuates as a function of the injunction [unitariness] cannot alone become the basis for altering the decree absent the *Swift* showing." *Id.* A fair reading of *Riddick, Dowell* and *Overton*, therefore, leaves no doubt there is a momentous dispute between the circuits on the significance of unitariness.

The suggestion that there is no substantive conflict among the circuits on the aftereffect of a final unitary declaration is just as misguided as respondents' assertion that the conflict is of no import. Brief in Opposition at 17. The dispute

between the circuits presented for resolution here is of "enormous importance," *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation* 100 Harv. L. Rev. 653, 654 (1987), and in fact remains the "most important unresolved issue in the school desegregation area," Note, *Unitariness and Busing: Placing the Burden of Proof for Obtaining Judicial Review When a School Board Stops Busing*, 92 Dick. L. Rev. 437, 441 (1988) (citing N.Y. Times, Nov. 4, 1986, at A27, col. 4).

Respondents' suggestion that the writ should be denied because the dispute is isolated to only *Riddick, Dowell* and *Overton* misses the point. Presently, the equal protection clause of the fourteenth amendment to the United States Constitution is being applied one way in the Tenth Circuit and in an opposite manner in the Fourth and Fifth Circuits. The U.S. Constitution should be uniformly applied to all states in this country based upon this Court's interpretation. Its application should not rest upon the mere fortuity of which circuit a school system happens to be located in. Public education is much too important an institution in America to simply allow the chilling effect of this conflict to remain unchecked.

The point is that every school system in this country involved with desegregation must know what the law is now so they can correctly make important policy decisions in the midst of changing demographics. It is equally important that the law be applied uniformly to all school systems, including the Oklahoma City School System. Granting the writ therefore is completely justified.

Respectfully submitted,

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No. 89-1080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma,
Petitioner,

v.

Robert L. Dowell, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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II. Certain developments necessitate this Court's immediate guidance on the issues regarding unitariness.

A. Demographic changes may require school districts to modify desegregation plans.

B. School districts need clarification as to the effect of a dismissal of a desegregation case in light of the U.S. Department of Justice efforts to reduce its caseload.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and the effect of unitariness at the same time.

ARGUMENT 4

I. THE LAW ON THE RIGHTS AND OBLIGATIONS OF SCHOOL BOARDS AFTER A TRIAL COURT DECLARES A FORMERLY SEGREGATED SCHOOL SYSTEM "UNITARY" IS UNCLEAR.

II. CERTAIN DEVELOPMENTS NECESSITATE THIS COURT'S IMMEDIATE GUIDANCE ON THE ISSUES REGARDING "UNITARINESS."

A. Demographic changes may require school districts to modify desegregation plans.

B. School districts need clarification as to the effect of a dismissal of a segregation case in light of the U.S. Department of Justice efforts to reduce its caseload.

III. THIS COURT HAS AN OPPORTUNITY TO RESOLVE THE ISSUE OF WHAT CONSTITUTES A UNITARY SCHOOL SYSTEM AND DETERMINE THE EFFECT OF A DECLARATION OF UNITARY AT THE SAME TIME.

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BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Counsel for both parties have consented to filing of the within brief.

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

School desegregation continues to be one of the most pressing issues in this country. NSBA submits this brief in the belief that the issues presented in this case must be decided so school districts

can be in a better position to address the continuing problem of racial isolation in the schools. In light of today's economic climate, it is important that every child, regardless of race, color, or national origin, be provided equal opportunities in the public schools of this country. It is also imperative that national rules be established so that the residents of all communities throughout the nation can feel that the school board in their community is subject to the same constitutional standards as the boards in every other community.

STATEMENT OF THE CASE

Amicus incorporates by reference the statement of the case in Petitioner's brief herein.

REASONS FOR GRANTING THIS WRIT

I. The law on the rights and obligations of school boards after a

trial court declares a formerly segregated school system "unitary" is unclear.

II. Demographic changes and federal government actions necessitate this Court's immediate guidance on the issues regarding unitariness.

A. Demographic changes may require school districts to modify desegregation plans.

B. School districts need clarification on the effect of a dismissal of a desegregation case in light of the U.S. Department of Justice efforts to reduce its case load.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and the effect of unitariness at the same time.

ARGUMENT

I. The law on the rights and obligations of school boards after a trial court declares a formerly segregated school system "unitary" is unclear.

There are few matters of public policy that are more important to every member of a community than those involving the desegregation of its public

schools. Therefore, it is imperative that the public perceive that decisions of their local school board and of the federal courts in their jurisdictions are based on the "law of the land." Currently, there is no "law of the land" relative to the rights and obligations of school boards after the trial court determines a formerly segregated system is "unitary."

This Court has ruled that state mandated segregation violates the Constitution, Brown v. Board of Education, 347 U.S. 483 (1954), and has expanded the coverage of the fourteenth amendment to include other forms of de jure segregation. Keyes v. Denver School District No. 1, 463 U.S. 189 (1973). This Court has clarified the obligations of school districts to remedy the effects of de jure segregation: first, by

requiring school boards to take an active role in the desegregation process and not merely grant students the "freedom of choice," Green v. County School Board, 391 U.S. 430 (1968); and second, the Court has ruled on the various methods of desegregation including cross-town busing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The Court has clarified the role of the state in the process. Milliken v. Bradley, 433 U.S. 267 (1977). The Court has also ruled in at least one case on the question of whether a state can restrict by statute school district efforts to voluntarily desegregate a school district. Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982). Of course, none of these areas of the law is simple and because of the variety of factual settings in which the legal

issues are presented, nuances have developed with regard to these major legal principles.

But the issues presented to the Court in this case are, indeed, new and perhaps even more difficult than those of the past. The lack of clarity in the law may force school boards to decline to make any changes in their plans, even those that could increase desegregation, because the only safe course now is to do nothing. But, even that course may lead to litigation down the road.

Desegregation decisions are among the most difficult with which school boards must contend. Politically, any course a school board takes is fraught with controversy. Thus, it is important that all the players know the rules of the game.

The National School Boards

Association (NSBA) does not have a position on the issues presented in this case and in the event this Court agrees to hear the case, NSBA will not file a brief on the merits.

As a matter of policy some school board members believe that once segregated by law, a school district should retain forever the burden of proving that any changes it proposes will not adversely affect desegregation. This has been called a "judicial 'no-man's' land." Morgan v. Nucci, 831 F.2d 313, 330 (1st Cir. 1987). The court of appeals in the case at bar adopted this position. It ruled that the issue is merely one of enforcing an injunction. Under the court's ruling, at the time of the hearing to determine whether "unitary" status has been achieved, the trial court must also determine whether

changed circumstances justify dissolution of the injunction. However, the court of appeals' decision implies that even if the injunction is lifted at the time the case is dismissed, the defendant still retains the burden of justifying any change in the plan.

Other school board members believe that once a school district sustains the burden of proving that the school district is "unitary," the school board's obligations cease except to the extent that it is prohibited from intentional discrimination. Under this latter theory, plaintiffs have the burden of proving that changes in the plan are discriminatory. The ruling in Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir. 1986), took this approach.

The court in Morgan v. Nucci, supra approved an arrangement under which the

trial court retained "standby jurisdiction." The first circuit ruled that there is "no legal basis for imposing a formalistic limitation on the broad remedial powers of a court of equity" by giving it only two options "keeping a case on its 'active docket' or total disengagement."

Undoubtedly a number of refinements need to be made in the law regarding the first stage of desegregation, i.e., the stage leading up to and including the approval of the desegregation plan(s). But most districts that have been under desegregation plans for a number of years are now in the second stage for which this Court has not developed the major legal principles.

Amicus submits that districts urgently need the answers to three questions: First, when does the duty of

a formerly de jure segregated school district to actively remedy segregation end? The decision in the instant case did not attempt to resolve this threshold issue of when a district becomes "unitary." Other cases have addressed the issue. See, e.g., Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989). The second question is when, if ever, formerly de jure segregated school districts regain the right to make student assignment decisions without regard to the effect on the court-ordered desegregation plan? The court in Riddick v. School Bd. of City of Norfolk, supra ruled that once the district is "unitary," at that time it regains the right to assign students without regard to the effect on the desegregation plan. It is unclear whether the decision in the instant case answered this question. It

could be argued -- as the dissent in the case did argue -- that the court of appeals in the instant case believes the district has a continuing obligation to justify any changes in the plan forever. The court of appeals argued that the burden to justify changes continues until the injunction is dissolved.

The court of appeals' discussion on the injunction issue, however, is simplistic because the court's criteria for dissolution of the injunction places the burden of proof on the school district to show that changes in the plan will not have a discriminatory effect. If in this case the injunction had been lifted at the same time as the case was dismissed, the trial court would not have had the opportunity to rule on the new student asssignment plan because it was not adopted until eight years later.

Apparently, the court of appeals believes that the injunction cannot be lifted in the abstract. It must be lifted in the context of an attempt to change the desegregation plan. Thus, the trial court in this case would not have had the power to dissolve the injunction at the time it declared the district "unitary" because no changes in the plan were proposed at that time.

If a court must rule on the appropriateness of each change, that places the district under the jurisdiction of the court in perpetuity, at least with regard to decisions that affect school desegregation. As noted earlier, Amicus is not stating a position as to whether that standard is correct. But, it is imperative that all school districts in a similar position to that of Oklahoma City know what the standard

is and that it applies to all similarly situated school districts in the country.

What Amicus seeks is stability. If school districts must remain under the jurisdiction of the courts, so be it. At least then each school board knows that its policy considerations must be formulated with this Court's standards in mind. If the burden of proof cannot be met with regard to a neighborhood plan, then school districts will have to seek other ways to meet the challenges posed by increasing minority populations. On the other hand, if this Court determines that the Tenth Circuit Court of Appeals was wrong and the Fourth Circuit was right, school boards whose districts have been declared to be "unitary" will know that they can now operate their districts without court oversight.

As noted earlier, whatever decision

a school board makes in this sensitive area is going to be the subject of controversy. Decision-making is even more difficult if the law is unclear. Where the law is clear and school boards operate within the confines of the law, history has shown that desegregation works. Now that formerly segregated school districts are administered by whole new sets of personnel, there is reason to believe that some stability in the law will lead to stability in desegregation efforts.

II. Demographic changes and government actions necessitate this Court's immediate guidance on the issues regarding "unitariness."

One could argue that the Court should postpone a decision on the issues in this case until additional cases have made their way through the courts. However, because of the federal

government's recent action in attempting to reduce its desegregation case load and because demographic changes are altering the complexion of the schools, school districts are between a rock and a hard place. They must make decisions now on whether to seek "unitary" status. In order to do that they must know what effect a declaration of "unitary" will have.

A. Demographic changes may require school districts to modify desegregation plans.

NSBA recently conducted a survey of the members of its Council of Urban Boards of Education (CUBE), to which 74% of the members responded. The districts that comprise CUBE are our nation's largest districts, educating more than four million children in America's urban public schools, 10% of the total public school student enrollment. The survey

asked the districts a number of questions about desegregation. In the school systems responding to the survey, non-white students accounted for two-thirds of all students. Only three of the fifty-two school districts surveyed never had a desegregation plan. Forty districts are currently involved in desegregation efforts, fifteen of which are operating under plans different from those originally ordered. As demographics change school districts are responding by seeking changes in court orders or orders declaring the district unitary. Others are waiting for additional guidance from the courts.

However, school districts of this size cannot remain static. They must change as circumstances -- such as demographics -- change. The white population is decreasing and the "school

enrollment statistics are telling us about a new, profoundly multi-racial society that neither our political leaders, research community, nor media have yet fully recognized. Teachers and school officials are dealing with a society that has changed dramatically since the time of our grandparents and that is continuing to change very rapidly." G. Orfield, F. Monfort Racial Change & Desegregation in Large School Districts -- Trends through the 1986-1987 School Year (NSBA Council of Urban Boards of Education, July, 1988) 2. See Appendix for an analysis of racial changes in student populations in 60 largest U.S. cities. Data in the Appendix is derived from G. Orfield, Racial Change & Desegregation in Large School Districts -- Trends through the 1986-1987 School Year, supra at 4-9.

Boards must make changes and cannot wait much longer for rulings of this Court. Yet, given the intensity of community feelings on the issue of desegregation, it is unfair to force school boards to make policy decisions that affect the entire community without a better picture of the legal framework in which they must operate. If the board decides to return all or part of its district to a neighborhood school system -- opponents point to Oklahoma City to argue that the action is illegal. If the board decides to retain its desegregation plan and make changes to reduce racial isolation, opponents point to Riddick to contend that such changes are unnecessary under the law.

Unfortunately, when the law is unclear, the debate centers on prognostications as to what the Supreme

Court will or will not do rather than on policy issues such as whether "white flight" is the cause of racial isolation in Oklahoma City, De Kalb, Georgia or anywhere else or is it caused by a decrease in the white birth rate or by a continuing movement to the suburbs by both whites and minorities? If the cause is white flight, will a return to neighborhood schools reduce that flight; if not, what other means exist for reducing the current racial isolation?

All of these issues should be studied in the community in an environment where the basic legal principles are settled. Citizens, courts, and the federal government have argued over the years that local school districts should be left to themselves to effect the management decisions that result in the desegregation of their

schools. Who is in a better position than the locally selected and accountable school board to call in the members of the community to discuss these issues that affect all of the community? Who is in a better position to organize citizen involvement in developing alternative assignment plans? Who is in a better position to ensure that teachers and administrators are trained to deal with the myriad problems entailed in the development of an effective desegregation effort?

Most importantly, who better than the school board is in a position to ensure that the desegregation effort works and is not merely an agonizing and futile exercise? Desegregation plans and plans handled voluntarily and cooperatively, with the full participation of the local school board,

administrators, teachers and community leaders, are invested with the potent opportunity of ensuring that the community understands why the action is being taken and is given reason to believe that it has contributed to the plan and stands to lose if the plan fails. A plan developed with the cloud of probable federal court intervention has much less chance of working.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process...local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation and a healthy competition for education excellence."

Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

Citizens in the school districts which have been subject to desegregation orders are urging their school boards to play exactly what this Court has indicated is their traditional role and to take control over the educational process. There also continues to be a demand by parents for neighborhood schools. This Court has indicated some support for neighborhood schools. "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." Swann, 402 U.S. at 28. Tne key is determining what is "equal." In the absence of guidance from this Court as to the parameters under which formerly de jure segegated systems

must operate, school districts remain in the dark as to who has the final control over student assignment decisions -- the board or the courts.

Amicus urges this Court to tackle these difficult issues now rather than waiting for additional appeals' court rulings on the issue. School boards need guidance now and the delay could cause needless harm to the educational process in those communities where the board is delaying action because of a fear of reversal or is taking action only to be reversed after the action has been taken. Unlike other cases the acts or failures to act in a desegregation case affects an entire generation of young people. It affects the entire community and their view of the educational system.

B. School districts need clarification as to the effect of a dismissal of a segregation case in light of the U.S. Department of

Justice's efforts to reduce its case load.

In the Spring of 1988 the U.S. Department of Justice announced that it was planning to seek dismissal of more than 200 school district desegregation cases where the districts have fully complied with court-ordered plans for a minimum of three years. Education Week June 1, 1988, at 18-19. From the community standpoint it is, of course, preferable to be relieved from the jurisdiction of the court so that the board can make decisions based on educational needs of all children and be relieved of administrative tasks such as preparing reports to the court and the plaintiffs. Arguably, it is also in the interest of the trial courts to be relieved from the duty of routinely deciding all manner of issues relating to

student assignment and other matters included in the desegregation order.

On the other hand, the process of achieving a court order dismissing the case and declaring the district "unitary," is expensive, can cause community anxiety and unrest and can be disruptive of the educational process. For these reasons, left to their own devices, many districts might opt to remain under court order. But as long as the Department of Justice continues to seek dismissals of these cases, the districts are forced to join in the Department's appeal to the court to dismiss the case. But -- if the effect of dismissal and achieving "unitary" status does not relieve the district of the court's jurisdiction, there seems little point in seeking that dismissal. Therefore, school districts need

clarification from this Court as to the effect of the dismissal of a desegregation case.

As part of the effort to "close down" its caseload, the Reagan Administration encouraged districts to dismantle their plans and adopt neighborhood student assignment plans. That Administration dropped some Justice Department desegregation lawsuits begun in the previous Administration and changed its position in cases such as that involving the validity of the Washington State statute which prohibited voluntary busing for desegregation. This "kind of dramatic, high visibility leadership" has resulted in both school officials and members of the public assuming that the era of busing and court-ordered desegregation is over. G. Orfield, Racial Change & Desegregation in

Large School Districts -- Trends through the 1986-1987 School Year, supra.

It is unfair to the hundreds of school districts who are under court-ordered desegregation plans for the federal government to lead them to believe that they can freely go into court and be relieved of all obligations to justify future student assignment actions that have a segregative effect -- if, indeed, this Court is going to rule at some future time that school boards are not free to take such action.

It is counterproductive to wait until after the school district has reassigned its students -- with the concomitant public unrest that such action always causes -- to decide that the action taken must be subjected to a degree of scrutiny that the district may not be in a position to meet. Again,

whether such a degree of scrutiny is justified is not the point. The point is that districts are entitled to know the standards now.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and determine the effect of a declaration of unitary at the same time.

Amicus further submits that the timing is right for this Court's intervention into these issues for another reason. A case is, or shortly will be, before the Court on a petition for certiorari which raises the issue of when a district is "unitary." In the case of Pitts v. Freeman, the Court of Appeals for the Eleventh Circuit held that a district has a continuing duty to desegregate its student body until such time as it has reached "unitary" status in all six Green factors, i.e., student assignment, faculty, staff,

transportation, extracurricular activities and facilities. Green, 391 U.S. at 435.

The questions of first, when a district is unitary and second, whether the district is then free to change in the plan are very closely intertwined. "The elements of a violation and who must bear the burden of their proof are not conceptually distinct from unitary status but are its components; indeed, the contrary assertion is dissembling." U.S. v. Overton, 834 F.2d 11271 (5th Cir. 1987).

Since it is improbable that a single case will raise both the threshold issue of when a district becomes "unitary" and the companion issue of the effect of a declaration of "unitary," this would seem an appropriate time for the Court to review both issues. Since it is

difficult to address one issue without also addressing the other, it may be easier for the Court to resolve both issues with the benefit of the arguments of the parties to both cases.

IV. Conclusion

Amicus submits that because of the inconstancy of student demographics and because of the Department of Justice's action in seeking to dismiss their desegregation case load, school districts need advice from this Court on the second stage desegregation issues of the nature and effect of a declaration of "unitary" status. Because desegregation activities are so compelling, and because school districts are being forced to make decisions even in absence of guidance from this Court, it can almost be said that the content of this Court's rulings on these issues is less important than

the need for the rulings to come now.

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APPENDIX

CHANGES IN STUDENT ENROLLMENT IN LARGEST SCHOOL DISTRICTS 1967-1986

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
New York	-155145	-14	-26	8
Los Angeles	-65246	-10	-37	-4
Chicago	-147231	-26	-27	5
Dade Co., FL (Miami)	23679	11	-40	9
Houston ISD	-61886	-24	-37	10
Philadelphia	-92768	-33	-15	5
Detroit	-133331	-46	-32	31
Dallas ISD	-24330	-15	-42	19
Fairfax Co., VA	23955	22	-19	6
Broward Co., FL	37949	40	-9	2

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Baltimore	-73916	-38	-17	15
Hillsborough Co., FL	20732	22	-11	1
Memphis	-10314	-8	-24	24
San Diego	-10680	-9	-32	7
Prince Geo. Co., MD	-33476	-25	-55	48
Duval Co., FL	-19143	-16	-12	8
Montgomery Co., MD	-16858	-15	-27	11
Clark Co., NV	32056	51	-11	3

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Jefferson Co., KY	-44264	-32	-27	26
Milwaukee	-37936	-30	-37	29
Pinellas Co., FL	14228	19	-4	2
Palm Beach Co., FL	25600	43	-9	-1
Washington, DC	-64281	-43	-4	-1
New Orleans	-24446	-22	-26	21
Orange Co., FL	11325	16	-16	8

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Albuquerque	936	1	-6	1
Baltimore Co., MD	-41780	-35	-14	10
Cleveland	-76202	-50	-18	13
Charlotte	-5300	-7	-13	11
Salt Lake	35117	94		
DeKalb Co., GA	-5891	-8	-46	42
Mobile	-8998	-12	-4	3
San Francisco	-32395	-33	-27	-5
Ft. Worth	-17080	-20	-32	11
Atlanta	-47192	-41	-34	33

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Columbus	-41843	-39	-21	19
Long Beach	-8019	-11	-48	11
Anne Arundel Co., MD	1807	3	-3	0
Virginia Beach City	24010	62	-9	3
Nashville	-30833	-33	-13	10
Cobb Co., GA	23271	60	-4	2
El Paso ISD	2139	4	-20	2
Jordan, UT	40955	204	-5	0
Austin ISD	21255	54	-34	1
Denver	-34705	-37	-29	8

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Boston	-31442	-34	-47	21
Polk Co., FL	8225	16	-2	-1
Fresno USD	-4557	-7	-28	2
Wake Co., NC	33555	137	NA	NA
Jefferson Parish, LA	2218	4	NA	NA
Tucson	3453	7	-11	1
Newark	-25151	-32	-12	-6
Cincinnati	-34993	-40	-19	19
Caddo Parish, LA	-6017	-10	NA	NA
Portland	-27025	-34	-16	7
Oakland USD	-17354	-25	-23	10
Greenville	-4868	-9		
Indianapolis	-57989	-53		
TOTAL	**-1188420**	**-15**		
AVERAGE	**-20490**	**-01.8**		

(18)

No. 89-1080

Supreme Court, U.S.
FILED
AUG 9 1990
CLERK

In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

vs.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

VOLUME I

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RELEVANT DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

THREE JUDGES
Murrah-Bohanon-Daugherty
(3-Judge court dissolved; reassigned to Judge Bohanon 7-10-62)

9452

TITLE OF CASE

Robert L. Dowell, an Infant under the age of 14 years of age, who sues by A. L. Dowell, his father as Next Friend,

Plaintiff,

vs

The Board of Education of the Oklahoma City Public Schools, Independent District No. 89, Oklahoma County, Oklahoma, a Public Body Corporate;

* * *

DATE	PROCEEDINGS
Oct. 9, 1961	Filed Complaint – with prayer for injunction – and THREE JUDGE COURT
Dec. 1, 1961	Filed Pltff's First Amended Complaint

Apr. 3, 1962	Ent trial before 3-judge court; parties appear by counsel; pltff presents case in chief offering testimony of witnesses and exhibits 1 thru 14, which are admitted; pltff rests; defts demurrer to evidence and motion to dismiss overruled; deft's case in chief, offering testimony of witnesses; deft rests; deft will furnish court with information re sex of children mention in exhibits 5 thru 13; as to merits, pltff will file brief in 15 days and deft 10 days thereafter to file brief; then case to be submitted; pltff to furnish Court with list of authorities re the jurisdictional question in a few days and it will be submitted (Murrah, Bohanon & Daugherty)
Jul. 10, 1962	Filed Order dissolving three-judge court and re-assigning case to jurisdiction of Judge Bohanon for further proceedings (Murrah-Daugherty-Bohanon)
Aug. 22, 1962	Filed Pltff's Second Amended Complaint
May 9, 1963	Ent Trial before Court: Parties appear by counsel; plf presents case in chief, offering testimony of witnesses; plf's exhibits 15 through 24 are admitted; plf

	rests; dft's demurrer to evidence overruled; continued to May 10, 1963, 10:00 a.m.
May 10, 1963	Ent further Non-Jury Trial: Dft presents case in chief, offering testimony of Jack F. Parker; dft's exhibit 2 is admitted; dft rests; dft given 20 days in which to file brief and plf 5 days thereafter to reply if he wishes; case then to be submitted.
Jul 11, 1963	Ent Order and Decree – THAT, if Robert Dowell presents himself, he shall be enrolled as a student at N. E. High School for school term beginning Sep 1963 w/o having to enroll in any course other than required of any other students; that the requested relief by dfts, Vivian C. Dowell and Gary Russell is denied. Okla. City School Board Independent District #89 and individual dfts named are permanently enjoined from continuing the "minority to majority" policy, hereby held unconstitutional, void and unenforceable; there shall be no special transfers, except in cases based solely upon scholastic study requirements or other valid good faith – in no case based on race or color; that the O. C. School Board Indep. Dist.

#89 establish a policy of integrating supervisory and teaching staffs commencing Sep 1963; dfts shall maintain complete records of all transfers made from dependent school districts into the dft school district and from school to school within the district, showing race or color of ea student and the specific reason for ea transfer, until further order of Court. Within 90 days from this date, dft School Board shall file w/ Court Clerk a complete plan for integration of Okla. City school system, both as to student body and teaching and supervisory personnel. Within 90 days, dft School Dist. shall file w/ Court Clerk the basis and all pertinent information used in the formation of respective school attendance areas, elementary, junior, and senior high school areas, insofar only as it pertains to Douglass, Central, and N. E. attendance areas. The Court retains jurisdiction to assure complete compliance w/ this Decree and for further orders justice and equity may require. (Clerk)

Aug. 6, 1963 — Filed The School Board's Program of Compliance with Court's Order of July 11, 1963

with Brief Summary of Attendance Area Changes in the Central Douglass-Northeast areas from 1955-56 to Present attached. w/s

Aug. 8, 1963 — Ent. hearing on deft's Plan and deft's Motion for new trial, w/ Counsel of record appearing and stating contentions. Testimony of Phil Co. Bennett is offered. Ct. approves school board plan, but will file his findings in a few days. Deft's motion for new trial is overruled. (Bohanon)

Aug. 9, 1965 — Ent hearing on plan. Parties appear by counsel of record. Plf. presents testimony of Dr. Earl McGovern, Dr. Willard Spalding, Dr. William Carmack, Jr. and Henry W. Floyd. Plf's Exhibit #25 is admitted into evidence. Case continued to Aug. 10, 1965 at 9:30 a.m. (Bohanon)

Aug. 10, 1965 — Ent further hearing on plan. Plf offers testimony of Dr. Chester M. Pierce. Plf. rests. Deft. presents case in chief, offering testimony of Phil C. Bennett and Jack F. Parker. Defts rest. Counsel make closing arguments. Court adopts plan of Drs. Spalding, McGovern and Carmack, said plan to be adopted by Sept., 1966. Plf. to prepare Findings of Fact, Conclusions of Law in 10 days. (Bohanon)

Sep. 7, 1965	Filed Opinion (Bohanon)
Sep. 7, 1965	Filed and entered Order that dfts submit, by Oct. 30, 1965, further desegregation plan to dis-establish segregation in O. C. public schools as to pupil assignment and transfer procedures, and hiring and assignment of faculty personnel; said plan shall provide a statement of goals to be achieved, descriptions of procedures to achieve such goals, statement of personnel responsible for carrying out said procedures, and early time schedule of steps to be taken to attain said goals. The plan shall specifically provide for: (1) New school dist. lines for Harding and N. E. Hi School and the Classen & Central attendance districts in accordance w/integration report, to be effective no later than start of 1966-67 school year – (a) Harding and N. E. to be combined into one dist. and ea. school to house all pupils residing in the new dist. eligible to be enrolled in either 7-9 or 10-12 grades, the Board to decide which school shall serve grades 7-9 & which shall serve grades 10-12; (b) Classen & Central shall be combined into one attendance dist., the decision as to which school shall serve 7-9 and 10-12 grades to be determined by Board; (2) the new

"majority to minority" transfer policy – transferees to have all rights of the school, etc.; (3) a revised special transfer policy w/specific stds & designed to eliminate requests for transfer to a school in which race of the transferee predominates; dfts shall file w/Court after opening of ea. school year, effective w/1965-66 yr a detailed summary of records concerning transfers required to be maintained by Court's Order of 7-11-63, as set forth herein; (4) desegregation of all faculty personnel so the ratio of whites to non-whites will be the same in ea. school by 1960, w/a possible 10% leeway; (5) In-service education of faculty incorporating recommendations in the integration report; (6) no inference may be drawn from this order that transportation by public school buses is indicated or inferred; (7) further study and action of the Board should be taken for complete desegregation according to law; (8) dfts to take immediate action to implement paragraphs 2 thru 5 for 1965-66 school year and report to Court within 60 days from this date the plans made and steps taken; Court retains jurisdiction and shall issue any orders becoming necessary for complete desegregation; assessment of costs and atty fees

	reserved until appropriate motions, briefs, and arguments are presented concerning same (Bohanon) (COB #68) (Copies of Opinion and Order mailed to Coleman Hayes, U. Simpson Tate, Derrick Bell, West Pub. Co., and Dr. Carmack)
Jun. 8, 1967	Filed Mandate from 10th CCofA (Judgment of Dist. Ct. affirmed in all respects except for provision requiring "in service education of the faculty" which should be eliminated therefrom; case remanded for further proceedings) OK: Bohanon
Jun. 30, 1967	Filed Board of Education's Proposed Plan for the Desegregation and Integration of the Oklahoma City School System
Jun. 30, 1967	Ent Order setting hearing on proposed plan Jul 27, 1967, 10:00 a.m. (Bohanon)
Jul. 27, 1967	Ent Hearing re Bd. of Education's Plan: * * * Court orders that part of Board's Plan be adopted and part rejected, all as per order (Bohanon)
Aug. 16, 1967	Filed Order that Proposed Plan should be approved, w/certain exceptions & modifications, as herein set forth (Bohanon)
Feb. 23, 1968	Filed dfts' Report on developments since approval of plan of

	desegregation and integration of Okla. City school system – w/s
Mar. 4, 1968	Filed Order Modifying Plan of Desegration and Integration of the Oklahoma City School System, ordering that complete consolidation of attendance areas and all grades of Harding (7-9) and Northeast (10-12) Schools, and of Central (7-9) and Classen (10-12) Schools in the next (1968-1969) school year is approved; Part 5 of the approved Plan of Desegration and Integration of the Okla. City School System filed 8-16-67 is modified accordingly; that the School Board may, at its pleasure, realign the neighborhood school boundary lines from time to time as it sees fit in the int. of good faith desegration w/o application, notice, or hearing to this Court (Bohanon) (COB #78)
Mar. 6, 1968	Filed plfs' Response to "Report of Defendants on Developments Since Approval of Plan of Desegregation" of Feb 23, 1968
Mar. 26, 1968	Filed letter from interested parties re "forced bussing" w/copies of petitions attached, bearing signatures of over 17,000 people

Jun. 12, 1969	Filed dfts' Report of Plan for Further Desegregation and Integration of O. C. School System in 1969-70 School Year w/attached Plan – w/s
Jul. 23, 1969	Ent Nonjury Trial: * * *
Jul. 24, 1969	Ent further nonjury trial: * * *
Jul. 25, 1969	Ent Further Nonjury Trial: all parties to file suggested Findings of Fact, Concl. of Law, & Judg. by Jul 28, 1:30 p.m.; set for oral argument Jul 29, 1969, 10:00 a.m. (Bohanon)
Aug. 1, 1969	Filed Order and Decree and entered same – THAT plan and supplemental plan, Exhs 1 & 2 treated as 1 plan attached hereto for further desegregating and integrating publ. school system of O. C. as submitted by Bd. of Education of O. C. Publ. Schools, are approved; ordered that said plans treated as 1, be put into force & effect for school year 1969-1970; dft/Bd. of Education ordered to prepare & file w/Clerk by Nov. 1, 1969, a full, comprehensive plan for complete desegregation & integration of O. C. Publ. School System as to students, faculty & employees of all grades, employed by O. C. School Dist.; request in atty's Motion re members Foster Estes and William Lott considered and denied; Ct. retains jurisdiction to assure

	complaince herewith or until further Order (Bohanon)
Aug. 1, 1969	Filed Report of Adoption of Supplement to Plan for Further Desegregation and Integration of the Oklahoma City School System in the 1969-70 School Year w/attached Supplement to Plan for Further Desegregation and Integration of the Okla. City School System in 1969-70 School Year
Aug. 8, 1969	Filed Order from CCofA (Order approving plan which involves school boundary changes which necessitate transportation of students from one area to another is vacated to afford Ct. apportunity to consider applicability of Section (407(a) 2, Title 4, of Civil Rights Act of 1964) and to fashion order accordingly; CCofA expresses no view re appl. of limitation to order entered but reserves judg until matter is 1st considered & decided in trial court.
Aug. 8, 1969	Filed Order and Decree; ordered that plan for further desegretating public school system of O. C. as submitted by Bd. of Education of O. C. Public Schools is in all respects approved; further decreed that dft Bd. of Education prepare by Nov. 1, 1969, for

	benefit of public & for this Ct's consideration a full, comprehensive plan for complete desegregation of O. C. School System as to comprehensive plan for complete desegregation of O. C. School System as to students, faculty and employees of all grades employed by said dft district (Bohanon)
Aug. 13, 1969	Filed/Order & Decree approving Oklahoma City School Board's Plan in all respects and the School Board is to prepare on or before Nov. 1, 1969 a full complete plan for the desegregation of the Oklahoma City School System. (Bohanon)
Aug. 28, 1969	Filed cert. copy of Order of CCofA, constituting Mandate
Aug. 28, 1969	Filed Mandate: Order of Dist. Ct. vacated; case remanded for consideration & adoption of plan for complete desegragation & integration of OC School system per court's order of 8-13-69 (Murrah, Breitenstein & Hickey)
Sep. 2, 1969	Filed cert. copy of Order of Supr. Ct. of U. S., granting applicants' mtn & vacating order of CCofA and reinstating order of U. S. Dist. Ct. pdg filing of an opposition to this mtn by the McWilliams group of intervenors by Sep 2 and further consideration then by Justice of this Ct. (William J.

	Brennan, Jr., Acting Circuit Justice)
Sep. 11, 1969	Filed Order that mtn to delay making, preparing & filing of plan of desegregation of jr. & sr. highschools of O. C. Pub. School System is denied & good faith plan is to be filed by Oct. 31, 1969; that mtn to delay making, etc., good faith plan of deseg. insofar as it affects elementary schools in dft dist is granted & dft Bd. is granted until Mar 31, 1970, to prepare such plan re elementary schools; Ct. orders U. S. Office of Education &/or its designate to assist dft School Bd in developing good faith plan for school deseg.; dft School Dist. ordered to fully cooperate w/its available funds provided under Title IV of Civil Rights Act and human resources available in an effort, & in conjunction w/U. S. Dept. of Educ. or its designate to develop an acceptable plan that will effectively deseg. school system; if plan, after its formulation, & as presented, is not acceptable to Ct., then Ct. will request US Off. of Educ. or designate to submit itw own recommendations to Ct. for consideration; that request that School Bd. not pass on & approve any plan of deseg. which might, by chance, be under supervision of another

School Bd, is w/o merit & it is ordered that present & all future School Bds, Supts of Schools, & employees of the Dist. are subject to deseg. laws as laid down by Supr. Ct. of U. S., and new or different School Bd, Supt., or subordinates cannot & will not of & in themselves change the law; Clerk directed to forward by cert mail a cert copy hereof to Dept. Director, Equal Educ. Opportunity Div., U. S. O. E., to U. S. Commr. of Educ., Gen. Counsel, U. S. O. E., and to Director of Consultative Center for School Deseg., Norman, Okla. (Bohanon) (copies mailed to parties of record & cert. copies as ordered – LDS)

Nov. 6, 1969 — Filed Dfts' Report of Comprehensive Plan for Complete Desegregation of Senior and Junior Highschools of the Oklahoma City Public School System After 1969-70 School Year – w/s

Dec. 15, 1969 — Ent Hrg. re School Bd's plan: * * *

Dec. 16, 1969 — Ent Further Hrg re plan: School Bd's cluster plan accepted by Ct. w/exceptions (Bohanon)

Jan. 12, 1970 — Filed dfts' Report of Adoption of Supplement to Comprehensive Plan for Complete Desegregation of the Junior and Senior High Schools of the Okla. City Public Schools After the 1969-70 School Year w/Supplement attached as Exh A – w/s

Jan. 17, 1970 — Filed Opinion and Order: All facts found herein and previous Orders, all competent evidence of record are relied upon to support this order; Deft Board's report for Comprehensive Plan & Supplement, APPROVED: Deft Board to file with the Court written reports by 6-15 and 10-15, 1970 with details re Dunjee and Kennedy schools: order applies to all parties to this action; specifically includes present & future members of said Board, and present and future superintendents and assts of O.C. Schools.

Feb. 19, 1970 — Filed copy of the Opinion per curiam of U.S. Supreme Court decided Dec. 15, 1969 (their case #603) Petition for certiorari granted – order of Court of Appeals vacated and case remanded to that court. (This copy received from Judge Bohanon's office)

Apr. 27, 1970 — Filed Order that dfts be granted to Oct 31, 1970, to prepare & file comprehensive prel. plan for total unification of elementary schools & until Mar 31, 1971, to prepare & file comprehensive, detailed final plan of desegregation to be fully effective by start of 1971-72 school term & are granted approval of their Interim proposals for further

desegregating & integrating elementary schools; HE&W ordered, immed., w/coop. of dfts, to begin a study & make recommendations for plan of desegregation for O. C. Pub. Schools as stated in oral opinion; copy hereof to be promptly mailed to Sec. of U. S. Dept. of HE&W (Bohanon)

Aug. 21, 1970 — Filed Findings and Order: Court finds and condludes [sic] that the time has come for this Court to divest itself of jurisdiction and end this case; it has fully & completely performed its duties required by the Constitution of the U.S. Court has approved defts' Cluster Plan, modified by the Court of Appeals; should the Bd. of Education not in good-faith operate under its declared Cluster Plan & should there be failure to desegregate the junior & senior high schools as provided by the Constitution, such failure should be brought to the attention of the Atty. Gen. of the U.S. Courts always open to perform functions in a plenary action brought by the Atty. Gen. Order heretofore ent. that HEW aid deft Bd. of Edu. in preparing & reporting plan of desegration of elementary schools now modified in that if deft Bd. of Edu and HEW should be unable to arrive at

proper plan of desegration of elementary schools, then the matter should be submitted to the Atty. Gen. of the U. S. DECREED that all orders heretofore entered by the Court in matter of desegregation of O.C. Public School System, be and remain in full force and effect, except as modified in paragraph 5. ordered that this case be and is hereby closed.

Oct. 12, 1970 — Filed Second Report of Bd. of Educ. on Implementation of Comprehensive Plan for Complete Desegregation of Junior & Senior High Schools of the O. C. Pub. Schools – ws

Nov. 20, 1970 — Filed Report of Adoption of Comprehensive Plan for Further Desegregation of the Elementary Schools of the Oklahoma City Public School System – w/s

May 3, 1971 — Filed Order: Findings and Order of this court of Aug. 21, 1970 vacated and set aside. (Bohanon)

May 7, 1971 — Filed Order for Dft to File report on Comprehensive Plan for Desegregation of Junior & Senior Highschools and for Counsel to File Appearances; ordered that dft School Dist. w/in 15 days herefrom file comprehensive report setting out things herein stated and hrg

will be held at early date upon suggested plans for deseg. of elementary schools; ea counsel who intends to further participate herein directed to file w/in 10 days hereof written appearance & state party(ies) represented & notices re further settings in this case will be forwarded to those counsel who so file appearances (Bohanon)

Sep. 1, 1971 — Received Order from CCofA re hrgs
Filed CCofA's Order that trial ct, forthwith, hold hrgs to determine effectiveness of plans heretofore approved by this Ct for the jr. & sr. hi schools of O. C. & to hold hrgs to evaluate expected effectiveness of plan for elementary schools; modification of either or both plans thereupon found necessary or addl plans to accomplish deseg. of O. C. public schools in accord. w/Supr. Ct.'s guidelines shall then be put into effect forthwith w/their implementation thereof to be accomplished in shortest poss. time (Breitenstein, Hill, & Seth)

Sep. 21, 1971 — Ent Hrg re status of operations: * * *

Nov. 9, 1971 — Filed copy of PLAN for the Further Desegregation of Oklahoma City Public School System (dated Nov. 1, 1971)

Nov. 18, 1971 — Ent Hrg re plan of deseg.: * * *

Nov. 19, 1971 — Ent Further Hrg re plan of deseg.: * * *

Dec. 3, 1971 — Filed Order, creating Bi-racial Committee (6 ea black & white members), to be apptd by Ct as herein set out, w/lists to be submitted w/in 10 days hereof by plfs & the Board in accord. herewith; after appt, Committee shall select chairman to serve 6 mos, w/chairmanship to rotate between white & black members; members shall be apptd for 2-yr terms; however, members of orig. Comm. shall draw lots whereby 6 shall serve only 1-yr term & vacancies of retiring members to be filed by Ct appt of persons of same race; in event of death, etc., new member to be of same race as member replaced w/nomination & appt to be made as herein set forth; Comm.'s function shall be to act as agency of Ct to advise Sch. Bd. & Ct. re practical appl, etc. of comprehensive plan for deseg., to periodically review operation of plan & other matters, all as more fully set out herein, but shall not supersede the Board; School Bd, et al., are enjoined & directed to cooperate fully w/Comm. & shall desig. not less than 1 nor more than 3 persons, members of Bd or Supt's supervisory staff, to act as liason, etc.; Comm. directed to avail itself of expertise, etc., of Community Relations Service of Dept. of Justice

when poss.; Sch. Bd. & said Comm. are to make bi-ann. reports on Nov 1 & May 1 to Ct re maintenance of a unitary school system, to incl info herein set out; said Comm. will function & this Ct will retain jurisd. of case until Ct finds that unitary system has been established (Bohanon) (copies mailed – sjb)

Dec. 9, 1971 — Ent Hrg re Plan of Deseg.: * * *

Feb. 1, 1972 — Filed Memorandum and Order – THAT Ct's order of 1-16-70 approving Comprehensive Plan for Deseg. of Sr. & Jr. High-schools of O. C. Pub. School System After 1969-70 School Yr and any subseq. order relating thereto are vacated & set aside; dft School Bd & indiv. members thereof, present & future, & Supt. of Schools shall implement & place into effect, beg. school yr 1972-73 A New Plan of Unification for the Okla. City Pub. School System, embodying principles & suggestions contained in plfs' Plan attached & incorporated by reference; plan for sr., jr., 1st alt. plan for elementary schools, & plan for Star-Spencer-Dunjee area are specif. approved; dft Sch. Bd. shall not alter or deviate from New Plan w/o prior approv. & perm. of

Ct. &, if uncertain re meaning or intent thereof, should apply to Ct for interp. & clarific.; Sch. Bd. may consider whether to chg structure as set out, whether 1973 grad. srs. should be permitted to elect to remain & graduate in school they have been attending, & other related matters; any proposed chgs to be referred to Biracial Committee for recommend. to Ct; spec. phase-in programs must be initiated in 1972 spring, as more fully set out herein; this order is binding upon dft Sch. Bd., its members, et al.; any attempt to hinder, etc., Sch. Bd., its members, etc., in exec. hereof shall be reported to Dept. of Justice thru U. S. Atty for W. D. of Okla. for approp. proceedings to safeguard federally protected rights & activities & to prevent obstruction of this order; jurisd. is retained by ct. for further orders (Bohanon)

Feb. 4, 1972 — Filed Order Implementing Bi-Racial Committee; * * *

7-7-72 — Filed Opinion from Clk of CCofA that judgment of USDC, WD Okla is affirmed (Lewis, Breitenstein & Seth)

11-1-72 — Filed Bi-Annual Report on Maintenance of Unitary School System – w/s

8-6-73 — Filed Bi-Annual Report on the Maintenance of a Unitary School System

8-6-73	Filed Semi-Annual Report of Biracial Committee May 1, 1973
10-31-73	Filed Bi-Annual Report on Maintenance of a Unitary School System, due Nov 1, 1973
11-1-73	Filed Bi-Annual Report of Biracial Committee
4-30-74	Filed Semi-annual Report of Biracial Committee May 1, 1974
4-30-74	Filed Bi-Annual Report on the Maintenance of a Unitary School System May 1, 1974
10-29-74	Filed Bi-Annual report on the Maintenance of a Unitary school system
10-31-74	Filed semi-annual report of Biracial committee
6-2-75	Filed dfts' Mtn to Close Case ws
6-5-75	Ent Order directing plf to file response to dfts' mtn for order to close case w/in 10 days hereof
6-9-75	Ent Order: By direction of Judge Luther Bohanon, a copy of dft's mtn to close case is being mld this date to all members of the Biracial Committee & the Committee is asked to submit a response w/i 15 days. (Bohanon)
6-17-75	Ent Order directing plf to file formal pldg w/in 10 days hereof as ltr rec'd June 16 will not suffice (Bohanon)

6-17-75	Filed Mr. Walker's letter to Ct, being response to dft's mtn to close case (or in alt., req. for ext of time of 5 days from date of "his Honor's reply to file proper pldg)
7-3-75	Filed plfs' Oppo to Mtn to Disms & Memo Brief – ws
10-31-75	Filed Bi-Annual Report on Maintenance of A Unitary School System by dfts Filed Semi-Annual Report of Bi-Racial Committee Filed Positive Activities Okla. City Public Schools
11-5-75	Ent Order: case set for hrg dft's mtn to close case 11-18-75 @ 10:00 a.m. (Bohanon)
11-18-75	Ent Hrg on Mtns: statements made dft presents mtn to close case w/test of witnesses & rests: plf presents objs w/test of witness & rests; ct takes mtn under advisement (Bohanon)
2-19-76	Filed Order Appointing Members of Bi-Racial Committee; * * *
4-22-76	Filed Biannual Report on the Maintenance of a Unitary School System
10-27-76	Filed Biannual Report of the Maintenance of a Unitary School System – ws
12-1-76	Filed Biannual Report of the Biracial Committee dated 12-1-76

1-18-77	Filed AND ENTERED Order Terminating Case – The Biracial Committe Established by the Ct's Order of 12/3/71, which has been an effective & valued agency of the Ct in the implementation of the Plan, is hereby dissolved; Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal (Bohanon) (COB#118) (clerk) (copies mailed-sjb)
2-13-78	Filed Order Directing Clk to Pay Assigned Attys' Fees; * * *
2-7-79	RECEIVED $67,777.77 TENDER from Board of Education, Okla. City, Okl.
02-19-85	MOTION To Reopen Case, To Intervene & For Fur Relief-n/s.
03-06-85	DEFENDANTS' Resp to Mtn to Reopen Case-w/s.
03-13-85	ORDER that before the ct can make any ruling w/re to applicants' mtn, the ct should conduct an evidentiary hrg. Mtn to intervene & reopen & dfts' resp join the issues & the matters are set for evidentiary hrg 4-8-85. 10:00 a.m. (BOHANON)
3-27-85	ORDER that hrg set for 4-8-85 is passed to 4-15-85, 9:30 a.m. due to sched conflict w/Judge Brett on 4-8-85.

4-15-85	EVIDENTIARY hrg on mtn to reopen: Ct grnts Ted Shaw to practice law in this cs only Ct receives Mr. Masem as expert witn, Ct adjourns til 4-16-85 at 9:30 am (BOHANON) bm
4-16-85	EVIDENTIARY hrg on mtn to reopen: Ct finds propsed plan of 12-17-85 should & is approved Ct finds K-4 plan is a goodfaith pln, Ct finds plf mtn to reopen denied. Plf makes oral mtn to stay order for purposes to appeal. Ct denies plf mtn to stay order. Dft to submit suggested FofF&CL w/i 5 days to Ct.
8-13-85	ORDER Deny Stay: re mtn of plfs Dowell, et al & applicants for intervention to stay judgment by Ct on 4-25-85; mtn to stay this Ct's judg is denied. (BOHANON)
7-25-86	CCA'S cert cpy of judg (reversed, remanded) (Moore, Anderson & Johnson)
02-05-87	SCHEDULING Order: * * *
03-24-87	ORDER modifying Scheduling Order: * * *
03-25-87	ENTER ORDER: the Final PT Conf prev sch for 10:00 am on Fri, 4-10-87 is hereby stricken & resch for 10:00 am on Thurs, 6-4-87; the Non-Jury Trial prev sch for 10:00 am on Mon, 4-27-87 is hereby stricken & resch for 10:00 am on Mon, 6-15-87 (BOHANON) kb

05-05-87	SCHEDULING/STATUS CONF: Thurs, June 4, 1987 at 10:00 am (BOHANON) kb
05-05-87	NON-JURY TRIAL: Mon, June 15, 1987 at 10:00 A.M. (BOHANON) kb
05-22-87	ORDER that ptys to submit PT Order & Trial Brfs by 5-27-87; further order that proposed FF&CL to be subm w/in 2 wks following the trial of this case
05-27-87	PRE-TRIAL Brf of Amicus Curiae United States
05-27-87	PLAINTIFFS' Trial Brf – w/s
05-29-87	FINAL PT Order
05-29-87	TRIAL Brf of the Oklahoma City Board of Education – w/s
06-04-87	STATUS/PT CONF: ptys agree & are ready for trial 6-15-87; * * *
06-04-87	APPEARANCE of Ronald L. Day as cnsl for dft Board of Education
06-04-87	APPEARANCE of Theodore M. Shaw as cnsl for plfs
06-04-87	APPEARANCE of Norman J. Chachkin as cnsl for plfs
06-15-87	NON-JURY TRIAL: * * *
06-16-87	NON-JURY TRIAL (2nd day)
06-17-87	NON-JURY TRIAL (3rd day)
06-18-87	NON-JURY TRIAL (4th day)
06-19-87	NON-JURY TRIAL (5th day)
06-22-87	NON-JURY TRIAL (6th day)

06-23-87	NON-JURY TRIAL (7th day)
06-24-87	NON-JURY TRIAL (8th day): * * * ptys to file Suggested FF&CL by 8-1-87, after which time a hrg will be set for hrg final oral args; Ct recessed until further notice
9-08-87	ORDER deadline for submtg proposed FofF&CofL ext to 9-29-87 (BOHANON)
10-2-87	ORDER United States' Mtn for Lv to file Post-Trial Submission Amicus Curiae in excs of 20 pgs grtd
10-2-87	POST-TRIAL Submission of Amicus Curiae United States
11-10-87	ORAL ARGUMENTS SET FOR HRG, 11-19-87, 10:00 am
11-30-87	HRG ON ORAL ARGUMENTS: Cnsl apr & hrg conducted; cnsl make opening statemtns & plf & dft prsnt argumnts; Ct will not decide case today but will file FF&CofL & Judgmnt w/i few days

12-9-87	MEMORANDUM Opinion
12-11-87	ORDER Judgement & Decree that fm Jan '77 to prsnt, dft Bd maintained unitary school system in keeping w/US Constitution; Ct vacates & holds for naught the '72 injnctn implementing Finger Plan along w/all other injunctions; Bd's 1985 K-4 neighborhood school plan was adopted w/o discriminatory intent & is constitutional; Ct again, as in '77, terminates jurisdiction over unitary system; Ct dism action at cost to plf

IN THE UNITED STATE DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, etc., Plaintiff,	)	
vs.	)	No. Civil 9452
THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, et al, Defendants.	)	

MOTION TO CLOSE CASE
(Filed Jun 2, 1975)

The Defendants respectfully state that this action should be terminated and the case should be closed for the reasons hereinafter set out.

In the first appeal that was taken in this case (*Board of Education of the Oklahoma City Public Schools v. Dowell*, 375 F.2d 158), the United States Court of Appeals for the Tenth Circuit stated as to this Court's retention of jurisdiction that,

> "jurisdiction should be held until such time as the court is satisfied that the decreed unconstitutional practices are eliminated and appellant board is found to be in full compliance with the teachings in the Brown case".

The Oklahoma City School District is in full compliance with the "teachings" in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); therefore, the Court should relinquish jurisdiction.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), it was

stated that further intervention by a District Court should not be necessary, when school authorities have achieved full compliance with the decision in *Brown I.*

The Oklahoma City Board of Education has eliminated all vestiges of State-imposed racial discrimination in its school system, and is now operating a unitary school system.

The School District has integrated faculties and staffs at all schools; it has complied with the Court's order of February 1, 1972, adopting the so-called "Finger Plan", and modifications thereof; and as shown by the Biannual Report filed herein on April 17, 1975, it has in all of its schools, except Arcadia Elementary School, a ratio of white and black students that does not vary a much as 20% of the ratio of the entire system, which is in accord with the decision in *Adams v. Richardson, Secretary of the Department of Health, Education, and Welfare,* 356 F.Supp. 92 (1973), and guidelines of the United States Department of Health, Education, and Welfare in school integration.

In *George v. Davis,* 365 F.Supp. 446 (1973), it was held that a school desegregation case involving schools that have been integrated according to law should be closed. It was pointed out that if there were any future violations of the law, a new lawsuit could be filed.

Since the objective of this case, viz., integration of the Oklahoma City Public School System, has been achieved, operation of the System should be returned to local control.

In *Milliken v. Bradley,* ___ U.S. ___, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069, it was said:

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process".

If the Court does relinquish jurisdiction, the Board of Education will establish a standing multiracial committee to assure optimal equal educational opportunities for all pupils. The committee would be comprised of representatives of the various races within the community; and on a predetermined schedule would report to the Board and would function until determined by the Board to no longer serve a useful or beneficial purpose.

Wherefore, the Defendants move the Court to terminate this action, relinquish further jurisdiction herein, and close the case.

J. Harry Johnson
603 First National Center West
Oklahoma City, Oklahoma 73102
Telephone (405) 235-7413

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF MAILING

The undersigned does hereby certify that on the ___ day of June, 1975, he sent by United States Mail, postage prepaid, a copy of the foregoing to the following attorney of record for the Plaintiff:

John W. Walker
622 Pyramid Life Building
Little Rock, Arkansas 72201.

WALKER, KAPLAN & MAYS, P.A.
ATTORNEYS AT LAW
622 PYRAMID LIFE BUILDING
LITTLE ROCK, ARKANSAS 72201
AREA CODE 501-347-3758

JOHN W. WALKER
PHILIP E. KAPLAN
RICHARD L. MAYS
JOHN M. BILHEIMER
HENRY L. JONES, JR.

OF COUNSEL
WILEY A. BRANTON
825 SIXTH STREET, S.W.
WASHINGTON, D.C. 20024
Phone: 202-554-5448

June 13, 1975

Hon. Luther Bohanon, Judge
United States District Court
U.S. Post Office & Courthouse Bldg.
Oklahoma City, Oklahoma 73102

Re: Dowell v. Bd. of Education
NO. Civ-9452

Dear Judge Bohanon:

This letter is intended as a response to defendant's motion to close this case. It is not in pleading form because in my considered judgment the motion is clearly premature. First, the matter is still being litigated and a number of issues remain unresolved. For example, there is pending before the U.S. Supreme Court a petition for a writ of certiorari regarding staff assignments. We have just today filed our opposition thereto. A copy of same is included herein for the Court's information.

There is also open for question whether the present desegregation plan is equitable and fair to black students in terms of equal burdens (transportation, etc.) and benefits; and to black staff in terms of the lack of establishment and implementation of objective criteria for promotions, transfers, etc. I note in this regard that your

Honor found in the latest appealed from Order that there was a pattern of assignments of principals that was discriminatory. That finding is thus essentially that not all roots and branches of discrimination in the system have been eliminated.

Third, there is the question of counsel fees which, of course, could be left open for further hearing.

Fourth, the Supreme Court through its pronouncements clearly did not intend to have cases like this one extend ad infinitum but did intend that jurisdiction be retained until such time that full desegregation was achieved in a manner sufficient to insure that resegregation would not occur. We therefore respectfully submit that in view of the litiguous posture of the board, the unresolved issues and the absence of a finding that resegregation will not occur under the present plan, the Court should retain jurisdiction for a while longer.

In the event that this letter does not constitute compliance with the Court's Order, please consider same to be a request for an extension of time of five days from the date of his Honor's reply to me in which to file the proper pleading.

Respectfully,

John W. Walker

JWW/jc
cc: Mr. J. Harry Johnson
Mr. Larry French

Enclosure

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, etc., et al., PLAINTIFFS,	)	
Vs.	)	CASE NO. 9452 CIV.
BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, etc., et al., DEFENDANTS.	)	

OPPOSITION TO MOTION TO DISMISS AND MEMO BRIEF

The defendants have filed their motion to dismiss the case in chief and set forth as the reason therefor that the desegregation issues are now resolved no longer necessitating the Court's continuing jurisdiction. Plaintiffs oppose the Motion to Dismiss both on the basis of the law and the facts.

In summary form, the Supreme Court has approved the concept that district courts "should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved." *Rancy v. Bd. of Education*, 391 U.S. 443, 449 (1968) (citing Kelley v. Altheimer, 378 F.2d 483, 489 (8th Cir. 1967)). In holding that dismissal "will ordinarily be inconsistent with the responsibility imposed upon the district courts", the Court reiterated that jurisdiction should be kept by the lower courts until "disestablishment has been achieved", supra; and until "racial discrimination through official

action is eliminated from the school system". *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971).

While the law is clear that it is inappropriate for a district court to dismiss a school segregation case until desegregation has been achieved, the facts in the district amply demonstrate that that hoped for status has not yet been reached.

Plaintiffs submit that the findings of the Court and the various reports from the bi-racial committee establish that the board is not proceeding to meet its desegregation duties in objective good faith. Indeed, the bi-racial committee has only recently found, on information and belief, that the defendants were continuing practice of racial discrimination in the inschool treatment of black students.

Were the defendants in a posture where their public utterances promoted respect for an acceptance of the law of the land and were their instructions to their subordinates who run the school clear and definitive in this respect, perhaps good faith would be established. But the official policy is still to be contentious and litiguous, thus placing on plaintiffs and the Court the responsibility for overseeing the desegregation process and protecting black school children.

When the results test is applied, the board is also defective. The "Finger" plan as it has come to be called has not been fully accepted by the defendants. The facts will show that that plan was designed to equalize the burdens and benefits upon black and white students alike. But the defendants have allowed the plan to be

implemented in a manner where the desegregation burdens upon blacks are grossly disproportionate without instituting any compensating features to minimize the effect. Thus, blacks ride buses in far greater disproportions; have schools which are located in "their" communities phased out more under the guise of low attendance, etc.; and are far more likely to be suspended or expelled from school for subjective reasons than white students.

Just as previous plans submitted by defendants failed to meet the "results" test, so does the present plan. For it has been emasculated by defendants. The constitutional tests are the same after the bodies are gotten together as before – whether the school system affords each child equal educational opportunity pursuant to objective, definable and fairly implemented standards. Plaintiffs submit that defendants have not yet met that test, and that until they do the Court must retain jurisdiction of this cause.

Plaintiffs incorporate herein by reference the remarks made in their letter to the Court of June 13, 1975.

In conclusion, plaintiffs submit that defendants have not met the desegregation requirements of the law; that the schools are yet segregated; and, thus, that that dismissal of the case in chief is inappropriate.

WHEREFORE, plaintiffs respectfully submit that the Motion to Dismiss should be denied.

Respectfully submitted,

WALKER, KAPLAN & MAYS, P.A.
622 Pyramid Life Building
Little Rock, Arkansas 72201

JOHN W. WALKER
HENRY L. JONES, JR.

By _____
John W. Walker

Attorneys for Plaintiffs

I certify that a copy of the foregoing was furnished opposing counsel of record by mailing same to the usual business address of such counsel on June 30, 1975.

_____

_____

[p. 1] IN THE DISTRICT COURT
OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, an infant, who sues by A. L. DOWELL, his father and next friend, et al,	)	No. 9452 – Civil
Plaintiffs,	)	
vs.	)	
THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, et al,	)	
Defendants.	)	

BEFORE:

HONORABLE LUTHER BOHANON
United States District Judge

PROCEEDINGS AT HEARING

Oklahoma City, Oklahoma

November 18, 1975

APPEARANCES:

For the Plaintiffs:

John W. Walker, Attorney at Law & Henry L. Jones, Attorney at Law, Little Rock, Arkansas

For the Defendants:

Harry E. Johnson, Attorney at Law
First National Building
Oklahoma City, Oklahoma 73102

[p. 2] INDEX

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(p.m.) 74

WITNESSES:

Name

November 18, 1975

(For the Defendants)

Paul English. . . .
Direct 10 . . .
Cross 18 . . .
Redirect 59 . . .
Recross 62

Thomas J. Smith. . . .
Direct 74 . . .
Cross 85 . . .
Redirect 127 . . .
Recross

Shirley Darrell. . . .
Direct 129 . . .

EXHIBITS:

November 18, 1975

Plaintiff's Exhibit 1 . . . document re suspensions ..... p. 46

2 . . . newspaper article 102

[p. 3] PROCEEDINGS

November 18, 1975

THE COURT: The Court has for hearing this morning the application of the of the School Board to close out this School Board case.

I want to say to the School Board, to you, Mr. Johnson, and all others concerned, that the Court would have great pleasure in closing out this case. Of course it is the oldest case on my docket, and I am sure it's the oldest case in this court; probably the oldest case in the state.

I would be very glad indeed to close the case out but the court has had a duty imposed upon the Court under the Constitution to require the School Board to desegregate a dual school system and to complete a unitary school system.

Down through the years the School Board has been rather stubborn in its concept of what the constitutional requirement means, and I am sure the School Board will say the same thing about this Court, that the Court has been rather stubborn about what desegregation of the school system means in a constitutional sense.

I am sure that the School Board down through the years has convinced themselves that desegregation has been, through the years, in compliance.

The record shows that the School board through its [p. 4] officials has said that desegregation of the school system was a desegregation when one black student was in a white school, or when one white student was in a black school.

Of course the Supreme Court has said this does not constitute desegregation at all.

I want to say that there has been much said about this Court having control over the School Board. Well, this is not true. This Court has never had any control over the School Board except as required by the Constitution to see that the School Board does desegregate the school system. Other than this, the Court has no control and never exercised any control whatsoever; does not now and never has and never will exercise any control over the School Board except as it is necessary under the Constitution for the School Board to desegregate the schools in good faith and in compliance with the Constitution.

Mr. Johnson says in his motion that he has complied, or the School Board has complied with the Brown case, one and two. I think if it were left up to the School Board, Mr. Johnson would have said this probably four or five years ago, but that wasn't true then. The Court will hear what the evidence is and determine what should be done.

If this Court finds that the School Board has in good faith desegregated the schools, and in good faith will continue the desegregation of the schools, then nothing would make me happier. This Court in years gone by has entered numerous [p. 5] orders, all of which the School Board elected to appeal from. That is, that I can remember. And none of these orders of this Court have been reversed that I can think of. This Court has been affirmed in all these orders in requiring this School Board to desegregate the public schools of Oklahoma City.

I am very proud of what the School Board has in the past two or three years done and are doing. I know they are doing a whole lot better job than in the early years,

and if you are not in compliance, strict and full compliance with the Constitution, you are moving in that direction. This makes me very happy.

As you all know, I took senior status more than a year ago, and I have finished out all of the cases that I have of the old cases, and I'd like very much to close this case out and will do so as soon as the School Board has in good faith met the constitutional requirements of desegregating these schools, or its schools, under the constitutional requirement.

Now Mr. Johnson, the Court will call upon you. Do you have anything to say in connection with the hearing before the Court today? The Court will hear you if you do, then I will call on Mr. Walker and Mr. Jones, and then we will hear the proof.

MR. JOHNSON: If the Court please, of course we, the School Board has been making two reports a year, due on May 1 and November 1.

[p. 6] THE COURT: Yes.

MR. JOHNSON: It is our position that these do show the progress that has been made by the Board in carrying out the Finger Plan.

We plan to call two witnesses. One is the president of the Board of Education, and to explain to some extent what we have done in addition to what we were required to do, what we think we were required to do. And that will be Mr. English, the president of the Board.

We have a new president of the Board. We have a new superintendent. Dr. Smith will be our second witness and final witness.

As you say, throughout the years there have been appeals from your Honor and I don't believe we have reversed yet.

THE COURT: Well, everything I have done, Mr. Johnson, I want you to know and I want the School Board to know and the public to know, I have done it because the Constitution of our country requires that I do it. This is the only reason. I have no other interest whatsoever.

MR. JOHNSON: Certainly I do understand that. We do feel this litigation has been going on for about twelve years now and the Board felt that its May 1st report showed that the school system was unified. Based on that, why then they have filed the motion to close the case which is before the Court to- [p. 7] day.

Of course we believe counsel is in agreement that this Court has the authority to close the case and a duty to close it if the system has achieved unification. We realize that for us to satisfy the Court we do have to unify the system.

We do realize that if the Court does relinquish jurisdiction that we will probably be subject to the scrutiny of the Department of Health, Education and Welfare. Our Superintendent spent several hours in the past with the people in Dallas with H.E.W. He is familiar with their guidelines and we feel that as well as having carried out the Finger Plan, that we are in accord with those guidelines and standards of H.E.W. that are followed in other cases; and we do expect to prove by our witnesses that we have achieved the state that has been the Court's goal and our goal.

THE COURT: Thank you, Mr. Johnson.

Mr. Walker?

MR. WALKER: Your Honor, Mr. Johnson, our position is that the test of whether or not the Court can relinquish jurisdiction is whether or not all vestiges of segregation or racial discrimination have been eliminated.

We suggest to the Court that the test is not merely in the numbers of children who attend each particular school or the racial composition of the staff of each particular school, or within the system as a whole.

[p. 8] We feel that the test first of all, as I understand it, is the good faith of the School Board and that good faith is to be measured objectively now by the conduct of the School Board, such as whether or not the School Board before proceeding to engage in new school construction or school closings or school disposition, by the way of sale and the like, has obtained or otherwise secured prior court approval. That's one thing.

Another thing is what happens to the children within the school; that is to say, are children assigned to classes on a racially segregated basis, are they assigned to special, a subsection within classes, are they suspended in numbers disproportionate to their racial composition within the school system? Are the reasons for which suspensions or push-outs take place objective and related to the educational process?

Those are the kinds of issues I think that remain in this litigation, and we suggest to the Court that unless the School Board an [sic] affirmatively demonstrate that they

have met the good faith tests and that the members indicate that all the branches of the tree which were infested with discrimination are removed, that the Court cannot relinquish jurisdiction.

Now the second thing is that we have pending a motion for counsel fees. We have supporting data to file with the Court this morning. And we would not like to take on both issues at the same time. We think the major issue of course is [p. 9] whether or not the Court should relinquish jurisdiction, and we would suggest that his Honor deal with that issue first and foremost. The other issue is rather minor.

THE COURT: Do you have such application for attorney fees?

MR. WALKER: Yes, your Honor.

THE COURT: When was it filed?

MR. WALKER: We had filed a motion for allowance of counsel fees back in 1974. We have not presented verification of time or anything like that because it is very difficult because of the protracted nature of this litigation to determine when we should cut it off.

When we thought we were about in a position to submit a time statement, there was another appeal from his Honor's decision regarding the principals, and that matter was taken through the Court of Appeals, resulting in oral argument I think on November 11, 1974, and a petition for reconsideration in the Court of Appeals which was finally decided upon by the Court of Appeals sometime in January or February.

Then there was a further motion in the Supreme Court seeking certiorari, for which we had to file an opposition petition.

So that we are prepared to submit our time statement today, but before doing that we would like to have a few minutes after the case in chief to confer with Mr. Johnson. [p. 10] He and I have had some discussion about the matter, and if possible, as much of the issue as can be agreed upon between us would be appropriate without having to submit it to the Court unless absolutely necessary.

Thank you.

THE COURT: Again I want to say that when the business of this Court has been completed, this Court will relinquish jurisdiction and close this case. From all the authorities I have read, I have no right, and should I close this case out or relinquish jurisdiction prematurely, it would on appeal to the Circuit Court be reversed; so we are now just looking at the cold facts and truth as to whether or not the School Board has and will continue desegregation in a constitutional manner.

Are you ready to call your first witness, Mr. Johnson?

MR. JOHNSON: Like to call Mr. Paul English as our first witness.

THE COURT: Mr. English.

PAUL ENGLISH,

called as a witness on behalf of the defendants, being of lawful age and having first been duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Johnson:

Q Will you state your name and your official position with the Oklahoma City Public School System?

A Paul English, President of the Oklahoma City Board of Edu-[p. 11]cation.

Q How long have you been president of the Board of Education?

A Since December 12, 1974.

Q Mr. English, I have handed you a copy of a motion to close the case which was filed in this case on June 2, 1975, and ask you whether you are familiar with its contents?

A Yes, sir, I am.

Q Was it filed pursuant to official action of the Board of Education?

A Yes, sir, it was.

Q To your knowledge, are the factual statements in the motion correct?

A Yes, sir.

Q The motion refers to the biannual report that was submitted to the Court on April 17, 1975. Has there been another biannual report filed since then?

A Yes, sir, within the past month there has been a more recent report.

Q That was the report that was due on November 1st?

A Yes, sir.

Q And filed on October 31, 1975?

A Yes, sir, that's correct.

Q Does the Oklahoma City list a count in all of its schools a ratio of white and black students that does not vary as much as 20% of the ratio of the entire system?

[p. 12] A Yes, sir, with the exception of Arcadia, which is geographically isolated and was treated in a little different manner under the Finger Plan and also in the Star-Spencer area, which the Court has already held can be treated as a separate community.

Q For racial balance purposes?

A Yes, sir.

Q Has the School District had any activities to foster further desegregation of the schools that were not required by the Finger Plan?

A Yes, sir, it has in past years and in most recent years. If I may refer to –

I think under some of the things that, say activities, increased student participation in activities within the schools, so that the students can get together in a more informal basis than just in a formal classroom setting; and that here we have a communication specialist in the schools under a federal grant that we have applied for. That person is to make students, all students especially under this grant, minority students, aware of the various activities that are available to them within the schools and the purpose is that more minority students would become involved in these activities.

We also have activity buses, additional activity buses provided at the end of the school day so that students who are bused into the schools can participate in after school activities [p. 13] and still have transportation home.

Early under the Finger Plan there was some problem that this was a deterrent to students who were bused in, that they had no way to participate and then get home, and now we do provide the buses for them.

The District also provides a cheerleader's workshop each year, for which the District pays the expense of this workshop whereas in the past cheerleaders would have to come with the money to pay for going to a workshop outside of the District; I think it was felt that this cut down on minority participation in cheerleader activities.

At the present time at the Grant High School we have a committee that is working on proposals to increase the informal associations of students in a homeroom situation, using some of the homeroom periods to have discussion more informally in dealing with the problems of students and their interests, something that is not always possible in the more formal classroom situation.

Recognizing that the needs of students within our system vary, we have established alternative programs. We have expanded alternative programs to meet these various needs.

We have also created the Orchard Park School which is for the girls who do not fit into a normal classroom situation, where there is indication that they would benefit more from other than a regular classroom situation.

[p. 14] Also we have created a program called "Focus" in the John Marshall and Star-Spencer High Schools, pilot program, again designed for students who would benefit more from a more informal, say, educational situation; that there are indications that maybe they are behind in some of their classwork, that they are not achieving at a sufficient level, or at their maximum potential in a regular classroom. They go to what is a school within a school, so that they do not have to worry about transportation to another school.

Also we have the Metro School, which is at the old Emerson Building at about 6th and Walker, which again is another alternative program in which students who for one reason or another do not function at their best in the regular classrooms situation can go to the Metro School.

And we have created his year the innovative high school at the old Central Building in downtown Oklahoma City, and again it is another program designed to meet the varied educational needs of students in the school system, and that school again was created with very definite student ratios, racial ratios, also balance as far as males and females go; and the same applies to the staff at the school. We are providing transportation. School opens in January. We will provide transportation to any student within the school district to come to the school, again getting around the possibility that some students be discouraged from coming to the school because they do not [p. 15] have transportation, recognizing that not all students have cars.

In the area again of the transportation, we have a transportation training officer now who helps train our

bus drivers in human relationships, discipline, safety, first aid, but again to improve the atmosphere on the buses within the District.

As far as the Board itself goes, I think that the attitude in the four years that I have been on the Board, I think I have seen it change considerably. The makeup of the Board itself has changed considerably.

Since the Court handed down its order I think early in February, maybe, in '72, there is only one member of the Board now who was on the Board back in January of '72; that this Board last December attended a Human Relations Seminar, went out of the District even, down to Seminole, to attend a Human Relations Seminar which would make us more sensitive to the problems within our District and to help us come forth with programs that would make other people within the District sensitive to the needs, to all the needs of the students.

And after coming back from that Seminar, we then adopted a policy, a human relations policy, and have established a committee to see that the policy is implemented within the District.

Q How long did that seminar last?

[p. 16] A Let's see. I believe we went down, seems to me like it was on a Sunday. It was for several days. It was an overnight affair, and there were top administrative people from the Central Office in addition to the Board members. The majority of the Board attended the meeting, the seminar.

The Board has created a Student Rights and Responsibilities Handbook Committee that draws up recommendations on policies dealing with discipline, attendance, and other matters which vitally concern students. The committee is comprised of students, teachers, administrators, parents. It is well represented by blacks and whites, male and female. The committee has functioned now – we have just created our thir [sic] committee, the third year we have created one of these committees.

Out of the first committee came our first systemwide Student Rights and Responsibilities Handbook, which was adopted by the Board, again setting out student rights, also the due process for students. The book was distributed to all students in the District.

Again this year when the committee made recommendations on revisions and the Board approved, the book has been distributed once again to the students within the District.

When we had some problems at Star-Spencer which appeared to be racial in nature, the Board took the initiative, created a committee of students, parents, teachers, administrators, to look into the problem. The committee studied it for a couple [p. 17] of months, made recommendations on this to promote unity and stabilize the enrollment at Star-Spencer, just as we have when the problem developed this year at U. S. Grant.

The Board again has had several meetings with the Biracial Committee in an attempt for each to understand the other's problems and also to understand from the Biracial Committee their sensitivity to some of the problems that maybe we are not aware of to arrive at, "Okay,

let's get a better understanding of things rather than just what's on the printed page."

Q When was the last time you had a meeting with them?

A As a matter of fact, last night was. We had one of these meetings. We set up another meeting in the month of December to meet with the Biracial Committee. We had an informal gathering at one of the Board member's home. I think it was back in the spring of this year. Again trying to, you know, learn how we could work together to improve the climate and the situation in our schools here.

The Board in the past year has been comprised of the situation of having a vacancy on the Board, and at that time the Board appointed a black member to the Board, the first time a black had ever been appointed to the Oklahoma City Board of Education, and she succeeded the first black member of the Board who was elected by the people of Oklahoma City and also re-elected. The black, Dr. Moon, is of course an educator, well-known, well-respected within the community, and he had been [p. 18] elected by the Board itself to the presidency of the Board which I think is quite an honor; and I think all of this really reflects an attitude of the Board that is for integration and is also for the education of all of the children within the school district, making sure that we treat all equally, recognizing that that is a very difficult task but that we are dedicated to that proposition.

MR. JOHNSON: Counsel may cross examine.

CROSS EXAMINATION

By Mr. Walker:

Q Is it Dr. English?

A No, sir, Mr.

Q What is your occupation, Mr. English?

A Reporter for United Press International.

Q And what is your education?

A My education?

Q Yes, sir.

A Okay. I have a B.A. from Oklahoma City University and I have done graduate work in journalism at the University of Oklahoma.

Q I see, The first point you seem to make is that this Board is different from the previous Board, is that correct?

A Yes, sir.

Q Explain how this Board differs from the previous Board.

A Okay. This would be my observation.

[p. 19] Q Yes, sir.

A Okay, and remembering that I did not serve on that Board in previous years.

Q Yes, sir.

A I look at some of the reading achievement scores from some of the schools within the District from the

past, prior to 1972, and I think that you can clearly see from those reading scores that those that what I would say were in the low income areas, and predominantly black schools, reading achievement levels were much lower than they were in your predominantly white schools; and it raised questions in my mind as to how much dedication there was to educate all the children within the District at the same level.

And I think that this Board has for one thing made reading achievement its number one priority. It has sought out federal monies to improve these achievement levels, to improve the ability of students to read.

We have set up alternative programs, greatly expanded alternative programs from previous years.

Q So that the first difference between this Board and the previous Board is that you feel that youall are more committed to delivering equal or quality education to all students.

A To all students, yes, sir.

Q Especially in reading.

A Yes, sir.

[p. 20] Q Now what are the other distinctions between this Board and the previous Board or Boards?

A Well, here again I have to go back to the Court's finding that the previous Board did not fulfill or carry out the cluster plan as it was designed, as it was presented to the Court.

I think that a Board that was dedicated to following the court order, as this one is, I think would have seen to

it that the cluster plan had been abided by whether they liked the plan or not. I think that is what this Board has done. I believe it has not agreed that this is the best way to go about solving our problems, but that it is a court order and we are seeing to it that it is carried out in good faith

Q Now then, in the event that federal monies are not continued for the reading program or other programs, have you devised fall-back alternatives to continue the same thrust?

A Well, we have not devised anything like that because we do have the federal monies at this time. If that comes, if federal monies are cut off, then I believe the Board is just as dedicated to try and provide the programs for all students.

Q I see. But you cannot commit, can you, to the Court that a year or two years from now the thrust which you have initiated will be continued in the event federal funds are reduced or discontinued?

A No, sir, this Board cannot commit another fiscal year Board.

[p. 21] Q Now when we make a distinction about this Board over against the last Board or previous Boards, where is the cutoff in time that we are talking about?

A Well, sir, i think that the big Board turnover that we had in the election in January of 1972 would be some indication. I think – I am trying to remember when we approved the reading as number one priority. I think it was in '73 that we went into the reading program.

Q So that as of 1973 the Board as it is now constituted was at least basically constituted in terms of a majority or a working majority for programs that are demonstrated by the reading program?

A I would say there has been an increased positive attitude on the part of the Board over the past four years.

Q All right. Now can you provide assurance – well, before I get into that – you cannot tell me, though, the date in which the new Board really came into being and the date that the old Board went out of existence, can you?

A No, sir, I cannot, because I think that it's a gradual change.

Q All right. Now you cannot tell me positively whether or not the thrust that youall project or initiate at this time will continue under a Board new to you at some foreseeable future date, can you?

A I cannot guarantee you that. I can go by that the people [p. 22] who serve on the Board are elected by the people of Oklahoma City, and this is the type of person they have been electing, a person who says, "Okay, we accept the court order as being a fact of life whether we like it or not. We are here to educate all the young people, and that's why we want to serve on the Board."

That's the kind of people they have been electing. I see nothing to change that attitude.

Q Presuming that the present Board is a good faith Board, and also assuming that the staff is a good faith staff, what assurances can you provide to the Court that

that will be the fact of life in Oklahoma City in one year or two years?

A I don't think anybody can really make that kind of an assurance to you outside the fact that if the Court relinquishes this jurisdiction, that anybody who wants to can come in and file a lawsuit and reopen the whole thing, and HEW will also be overseeing us and that is, with the federal monies involved certainly no one wants to see the money cut off.

Q Now you are aware that each Board which has come before the Court has indicated that it was a good faith Board, are you not?

A I am aware that that has been the statement in the past, yes, sir.

Q Now what is there about you as chairman or the Board as presently constituted that causes you, in your judgment, to be [p. 23] different from previous Boards in terms of your willingness to respond or unwillingness to respond to what you perceive to be the public will?

A Okay. If I may explain about the public will because I think there has been a change in attitude in the past four years in Oklahoma City. I think that the people of Oklahoma City have come to realize that desegregated schools are a fact of life and that there is no getting around it; and that not all people agree with the court plan, but I have seen, from the phone calls I have received over the four year period – I was on the Board shortly after this order came down when we first started in the Finger Plan, and there were plenty of phone calls and a great misunderstanding among people from people

who felt that you did not have to abide by a court order, that you could ignore a court order.

I think that now people have come to the understanding that you do have to abide by court orders and there is a law of the land and that segregated schools are a thing of the past.

So I think the will of the people has changed somewhat, the perceptions have changed.

Q Has the Board devised any techniques for being able to measure "the will of the people" insofar as it relates to further integration and desegregation of the schools?

A I know of nothing that we have done to measure this will of the people outside of the school board elections, that would [p. 24] measure the will of the people, but I am not sure that Board members necessarily always reflect the will of the people. It gets into the classic battle of, you know, are you simply a reflection of the people or are you leaders? And I think sometimes elected public officials have to take leadership even when it is not the popular thing to do.

Q Mr. English, are there any other problems that you can identify which are racial in the historic sense that remain within the school system?

A Within the system?

Q Yes.

A Well, okay. Here I would maybe broaden the question a little bit to the geographics of the whole thing of the housing patterns within Oklahoma City. I think

that is a hindrance to integration within the school system.

Q I am not dealing with the housing now. I am just dealing with the system itself. Are there any other vestiges of segregation and discrimination in your judgment which remain?

A I frankly cannot think of any.

Q Are you aware of the School District's policy on the recruiting of staff?

A Recruiting of staff?

Q Yes, sir.

A I am not really very much aware. I think probably the Superintendent would be better able to do that.

[p. 25] Q You cannot state whether or not, you cannot tell the Court that the historic vestiges of segregation or discrimination which existed in regard to recruitment either have been eliminated or will in the future be eliminated by positive Board declaration and action, can you; you can't say one way or another, can you?

A As I recall, we have indicated through the human relations policy and other policies of the Board that the Board's stand is one, one that we do not hire on the basis of, you know, racial discrimination and sex discrimination and other types of discrimination. That is our stand.

Q But in terms of having a stand and implementing a stand, you are talking about two different things, aren't you?

A Yes, sir.

Q Now are you familiar with the innovative high school?

A Yes, sir.

Q Did the Board devise any objective recruitment system for staffing the administrative echelons of that school?

A Okay. The Board in setting up the program at the innovative high school provided for certain racial balances within the staff and the student body of that school, and in the implementation of that, the director, the staff members, advisory committee, students, parents involved with that school have gone and recruited staff members.

Q I understand that, but isn't it true that the Board did [p. 26] not instruct its Superintendent to devise objective non-racial non-discriminatory recruiting methods, and that the result is the result that you have had with the filling of every new administrative vacancy that you had at the secondary level, that is to say that you have gone and recruited a white staff person to head the institution?

A I would not agree that we have recruited white staff people, exclusively white staff people.

Q Now you did have, did you not, some standards that the staff persons who would head the innovative high school would meet, isn't that correct?

A Yes, sir.

Q And you set out similar standards for the second person, didn't you?

A Yes, sir

Q You did not say that one of those two persons, in you policy statement, had to be black, did you?

A No, sir, we did not.

Q I see. So that your administrative staff was free, along with the advisory committee that you devised, to go and recruit whom they pleased without any directions or instructions other than not to be discriminatory with regard to race?

A I think that would be accurate.

Q Now are you aware that the first dozen or so people who were recruited to staff the so-called innovative school, that [p. 27] all of them were white?

A Well, I think that we had a problem in getting blacks, particularly black males, to agree to serve on the staff.

Q All right, but my point is that you do agree that the first dozen or so persons who were picked to staff that school were whit , [sic] is that correct?

A Again I don't know that I would say "picked". I am not, you know, I am not that close to exactly the procedure, except my understanding of the procedure is that there were some blacks who were selected who simply said, you know, "Thanks anyway."

Q All right, but the results, we start off either with results – that's the history of this litigation, results – the result has been that the first dozen or more staff persons selected were white, isn't that correct, for other than custodial type jobs?

A I would say that the first maybe eight or nine that I am aware that were hired.

Q All right.

A That were hired on were white.

Q Isn't it true that what you did was basically you got the nucleus of your staff in the first eight or nine people, you got you heads of departments if you had those things, and you had the persons who really run the school in that first eight or nine, didn't you?

[p. 28] A Well, my understanding of the structure of that school doesn't, is not that there are, you know, one or two or three or four or five administrative structures within that school. The director is there and then you have the facilitates within the school.

Q Now all of the facilitators initially hired were white, weren't they?

A I believe that's –

Q All right.

A Well, the first whatever, eight or nine.

Q Are you aware of the fact that Title 7 in the 1964 Civil Rights Act, which is the non-discrimination in employment Act, applies equally to school districts as it does to private employers?

A I am not aware of all the ins and outs.

Q Have you discussed the ramifications ever in your Board meetings of Title 7 to your employment pattern of practices?

A We have discussed employment practices and federal laws. As to whether Title 7 or whatever, or whether simply that we need to have more blacks, better racial balance within our staff, within administrative staffs, Central Office staff, as specifically to Title 7 I could not say.

Q Are you aware of the posting provisions of the non-discrimination law which say that if you have jobs as a public agency that they have to be posted and notice be given to the [p. 29] general community at the same time about the existence of opportunities, rather than allowing you to go and pick people whom you want to for no objective reasons to fill important jobs in your school system?

A I am aware that we do have to post job openings and that job openings in the Central Innovative High School were posted.

Q Where were they posted?

A My information is at least in the school.

Q All right. Now were they posted the in high schools before the vacancies were filled?

A That's my understanding, yes.

Q That's your understanding?

A Yes, sir.

Q Now has the Board taken this matter up as a Board in a public session?

A In a report on Central Innovative High School it was mentioned, but as far as Board discussion on this and

in a pre-meeting I had raised the question about whether jobs were posted and was informed that they were posted.

Q Now the second thing is, assuming that they were posted, and you did not get a pool of black applicants, did you seek to devise additional measures or methods for obtaining a sufficient pool of black applicants, comparable to the pool of white applicants?

A The Board itself sets policy, and it is the job of the [p. 30] Superintendent to carry out policies, so I think he would be better qualified to answer that.

Q Now after you dealt with your pool, did you establish objective criteria for the selection of personnel to fill each of those positions within the so-called Innovative High School?

A I think again this is getting into more of an administrative matter. Job description and this type of thing are what is done by the administration.

Q The Innovative High School has been one of the things that you and this new Board have projected as a manifestation of your changed intention, isn't that correct?

A That's right.

Q But you did not as a Board see fit to devise objective qualifications for each of those jobs, did you?

A As a Board we – I can't think of any job that we have set up, any job description outside of Superintendent, and only that this year.

Q Did you set up any objective criteria for promoting, demoting or terminating personnel who may have been assigned to that particular school?

A No, the Board has not set up.

Q Now the Board proposes, does it not, to spend more money per student for each student within the Innovative School than it does for each pupil in the other high schools, isn't that correct?

[p. 31] A Within your regular high schools?

Q Yes, within your regular high schools.

A The other alternative programs, we have some that are – well, most of our other alternative programs are more expensive per pupil.

Q What is the projected per pupil expenditure for each student within that high school?

A Well, I don't know that anybody has set down a specific figure. I have done some figuring on figuring of faculty, staff and utility costs, and compared that with some others.

Q Could we not say that what you intend to do with the school, though, sort of suggest, per pupil expenditure, you plan to have lower pupil-teacher ratios, do you not?

A Than you regular high school.

Q Than the regular high school; and you plan to offer whatever programs are in demand in addition to those that are decided upon by the school staff, is that correct?

A I think that would be.

Q And the number of pupils who will constitute a particular class will be much less, perhaps, or possibly than in regular classes?

A It could.

Q So that the per pupil expenditure may be anywhere from two to three times as much as within a regular high school, isn't that correct?

[p. 32] A I would say that on the outside it could be twice as much.

Q All right.

A I don't think so but it could be, the first year.

Q Are you aware of the Oklahoma law, not the federal law that deals with the Fourteenth Amendment equal protection of the laws, but the Oklahoma law which provides for equal protection, treating all students, all people under state law more or less equal in terms of benefits that the State affords?

A I had not had that recalled to me, but you now remind me.

Q Now isn't it a discrimination to some students when you do not allow them the same benefits that you allow to other students?

A All the students within the high schools of Oklahoma City are eligible to apply, and have the same opportunity and the same chance, because it will be a lottery selection to attend this school.

Q But the point is that what you are doing is saying that you are going to give more governmental benefits to some students, and we are going to limit the number and we are going to deny those benefits to the large majority of students by definition by limiting the size of that school to two or three hundred students, isn't that correct?

A I would say that with any alternative program, whether it's Washington Center, Orchard Park, the Vo-Tech schools, certainly would be – that's probably the most expensive program [p. 33] per student that we have in the system, and if we went by flat level we would not be able to educate the students of low income background, we would not be able to spend more money on them, which I believe we do now, than we do for some youngster who comes from a very well-to-do family.

Q All right, but that Vo-Tech example you mentioned is a subsidized federal situation to a great extent, isn't it; vocational education is subsidized by the federal government?

A As I recall, we get fifty percent reimbursement – I don't remember whether it's all from federal or not.

Q And your new program is going to be wholly or almost wholly going to be funded by local school district funds, isn't that correct?

A It will be financed here wholly.

Q And when we state talking about your good faith, I ask you with regard to the classroom situation, do you still allow the result of segregated classes within the so-called integrated school?

A Well, I look at what the Biracial Committee reported in its latest report saying that – if I could quote from the, could I refer to –

Q That report is not necessarily evidence but I think what we are dealing with are facts at this time.

A Okay. It will vary from class to class as to whether you have mixed seating or not. As I recall from again reading that [p. 34] report saying that where it's left up to say freedom of choice within a classroom there that people who ride the bus together tend to sit together.

Q All right, but you allow freedom of choice for class assignments?

A It varies from school to school, from class to class. Some teachers will assign seats, other teachers will let it be. Gym class, you know gym class you can't assign seats.

Q But your policy does operate, or the lack of policy does operate to permit in-class segregation, doesn't it?

A In some situations students are permitted.

Q Has the Board developed a policy for dealing with that branch, in my judgment, or the root of segregation?

A We have no policy that I am aware of, that speaks specifically to that.

Q Now you do have some all white classes and all black classes in your high schools, in your junior high and middle schools, don't you?

A I believe that is indicated in some of them.

Q And you have indicated that one of your concerns has been to make sure that blacks get the same access to education that whites have, is that correct?

A Yes, sir.

Q Now isn't it true that at this time they do not have the same access to education that whites have?

[p. 35] A No, I believe that they have the same access.

Q Well, if you believe that they have it now, did they have it four years ago when you had that bad Board?

A That they had the same access?

Q Yes, sir.

A Well, yes, it depends on your definition – if you go back – okay, we were in school at that time if you say that it's all black or all white, it's not a quality equal education, I guess.

Q We are talking about segregated classes now.

A Okay.

Q Within the integrated schools. But the schools that you want us, want the Court to leave alone, now you do concede that you still have segregated classes, don't you?

A I would say if the class is segregated that it is by choice of the student, that if they want to take a class they can take it; also in some cases of course where students are assigned to a particular educational program, a special educational program or something of that nature,

then according to an educational need, a provable educational need, it may result that way.

Q All right, so that you have blacks disproportionately found in Special Education, don't you?

A Disproportionate to their percentage within the School District?

[p. 36] Q Yes, sir.

A I believe my recollection is that –

Q (Interposing) And you have whites disproportionately found in academic courses at high school level, don't you?

A I really haven't studied that.

Q Now if you are going to come to court and ask him to divest of jurisdiction, I suggest that you look at your report to the Court, which was submitted after November 1, 1975.

I call your attention to the John Marshall High School, beginning with page 1 of that exhibit.

While you are looking for that, you suggest that basically blacks haven't been taught to read to the same extent that whites have within the school system, is that correct?

A I think in the past.

Q And the same would hold true – when you said "read" you weren't really limiting it to reading, were you, you were talking about adding – they weren't educated to the same extent the whites were, isn't that correct?

A That's my opinion.

Q All right. Now if you look at the Marshall High School – I suggest that you deal with my questions with that view in mind – look to that page 1 and explain to me and to the Court with regard to grammar and vocational REV, whatever that means, how in one class you could have one black and 33 whites, and in another one, three blacks and 27 whites, and yet another, [p. 37] ten blacks and 28 whites, the point being that even if you don't have but fourteen blacks, why aren't they more dispersed in those three classes, rather than having only one in one class and the great bulk of the blacks in one class?

I know you can't explain that particular case. I want you to look at that and go to the next page. We are talking about pattern. Page 3. We look at Ancient History. We see 18 whites, no blacks. We look at Anthropology, a college oriented course, 24 whites and one black.

Experimental Psychology, 20 whites, no blacks.

On to the next page, Chemistry 38 whites, no blacks. In the whole Chemistry line, basically a handful of blacks and a large number of whites.

Trigonometry, one black out of 54 whites; and then on page 5, Algebra, one class, Elementary Algebra, 14 blacks, 23 whites. The other Elementary Algebra class, zero blacks, 17 whites.

Now how do you explain these patterns that in a few cases where blacks do take difficult academic courses they seem to be lumped together or they seem to be totally segregated; how do you explain that pattern in John Marshall?

A I really don't know. I can think of some reasons that are possibilities, but as far as a definite answer to it, again all theses programs are of course open to the students if they want to sign up, but again to your thinking where there is zero in [p. 38] one and fourteen in another, I know that the computer gets into making out schedules. There are differences in student scheduling. I don't know what time Elementary 1-A, you know –

Q All right. Now the counselor also has a role within each school in encouraging or influencing a class, the grouping of particular students, is that correct?

A The counselor does counsel with the student about what classes.

Q You also have the concept still working in your school of ability grouping, don't you?

A I believe that's –

Q All right, now if your statement is true that blacks historically, at least through this bad Board, were denied equal education, how then can you use a concept of ability grouping for school assignment?

A I wouldn't say exactly ability grouping. I think the Superintendent can respond to this question on that part a little better than I can. He knows more the ins and outs of it. I know educational programs sometimes depend, you know, you are trying to reach the – to the best for the students that you can.

Q We are not concerned at this point, in my judgment, with the good faith of Dr. Smith. We are concerned with the good faith of the Board and the knowledge that the Board has about the school system and whether or

not the knowledge is suffi [p. 39] cient for it to really in good faith represent to the Court that it knows enough about the school system and is committed enough to prevent segregation and discrimination from recurring.

Now look to the next page, 7, and explain to me how there are so few blacks in your foreign languages and why after the first year there are no blacks in your foreign languages at Marshall, only whites.

A I do not know the answer to that.

Q Now look and see whether or not there is not a pattern with regard to all of the academic courses that are regarded as difficult, Chemistry, Math, Science, Biology, except for Basic Math, Basic Biology, things like that – and tell me what you as a Board member and also as Board president would do to bring the black interest at least and black ability to be assigned to these particular courses on some kind of a distributional basis up to equality, and also t ll us when we may expect that if we ever may.

A Well, I think that we expect the Superintendent and the administrative staff to do what they think is best about providing the best educational program for each individual student; and we set out the broad policies. We set out the broad policies for the Superintendent and then periodically we are to evaluate the Superintendent, the job the schools are doing, and seeing that they are achieving, and among them course edu [p. 40] cational achievement, racial balances within staff, within schools. That's all part of the evaluation. If the Superintendent doesn't do it then you make a change.

Q Now were you aware before I recited those instances of disparity that they were as I have suggested they are?

A I was aware of some of the disparities here, as you call them, but I really take that the Superintendent, knowing him, that he has seen to it that our policy is implemented in good faith and that there is a good educational reason for what is on the sheet.

Q Now is that the result that youall desire, that I just explained to you?

A The result that we desire is that the best education be provided for the individual student based on his needs and, you know, if it means that there are going to be twelve students, twelve black students in Latin 2 or 4, Latin 4 – well, I'm sorry, there aren't any.

Q Okay.

A If it means you are not going to have 20% or 30% blacks in each class within a school system or within a school, that is all right with me if it means that the child is being educated to the maximum of his potential.

Q What is the difference then between your position that you just stated and the previous Board's position, because the previous Board took the position that they were educating each [p. 41] child to the maximum of his potential.

A Okay. I think the proof will be in the pudding and that is I don't think that you can say that this is a measure of education, that because we have two students, black students in Latin 1, that we are not educating all the students in the District equally.

Q I was just using those as an example, Mr. English. I think that we can go back. I haven't made a survey but I think we can look at Southeast School and let's see if we find the same pattern. Southeast is on behind Marshall School.

All right, look at Algebra 1, the class of Delmar Boyle is on page 2. He's got 11 blacks and 33 whites, but the next class is 5 blacks, 23 whites, and the next 6 and 29, and the next 3 and 29, and again the same pattern, isn't it?

Geometry, no blacks, 17 whites; 1 black, 27 whites. You look at Great Books, 2 blacks, 14 whites. You look at Advanced Composition, 1 black, 27 whites. All of the tough courses, "tough" courses, are disproportionately white.

If you look at the easy courses, Basic Math, let's say General Math, 13 blacks, 16 whites. That is under Mrs. Flynn. Look at General Math under Mr. McElwee, 13 blacks, 13 whites.

Look at some of the other courses. Problems of Democracy, 13 blacks, 24 whites. You look at Black History, 15 blacks, no whites.

Now you and I both know that the pattern that exists in [p. 42] Marshall, isn't this correct, are the same patterns that are in the system as a whole, that blacks are special education and the basic courses and the vocational courses, and your counseling program does nothing to really get them out of it in an effective way, or at least to the extent where there will be some foreseeable

date in the future blacks going on in college preparatory courses in more or less the same numbers as white?

A I would say from looking at statistics you cannot tell what is behind those statistics.

Q That's right, and youall haven't looked, as a Board, to handle those statistics, even though you had these various statistics for four years, isn't that correct?

A I think we instruct our Superintendent to see to it that the educational program is devised and implemented to provide for the educational needs of each student regardless of race or sex.

Q All right, let's deal with the question of school suspensions. Now can you tell the Court that black children are more or less a disciplinary problem than white children?

A I think the record indicates that more blacks are suspended than white students.

Q The question, though, is not that. Can you say to the Court that basically and inherently blacks within a school system are inherently more of a discipline problem than whites?

A I cannot really say that.

[p. 43] Q All right.

A I know we have discipline problems that may involve both blacks and whites.

Q You had discipline problems, you had discipline problems when the schools were segregated, didn't you?

A As far as I know, we have had discipline problems as long as we have had schools.

Q All right.

A And we will continue.

Q Did you go to high school here?

A No.

Q I see. Where did you go to high school?

A Ada.

Q Ada. All right. Do you recall ever being in a fight in high school yourself?

A Not in school.

Q Not in school but after?

A After school, okay.

Q Okay. Did you get expelled for that fight?

A No, sir.

Q Do you recall ever doing a finger sign to another student in the presence of or maybe behind the back of a teacher – not you, but somebody else?

A I would say that back when I was in school, the finger sign was not all that popular. In fact I don't think I even [p. 44] knew until it was some show that that first came along.

Q The point I am making, the conduct that youall engaged in, or we engaged in – we are in basically the same generation, I guess – was no different than the

conduct that is now being engaged in, isn't that correct, white on white or black on white?

A We had our discipline problems back then.

Q But you didn't expel for long periods because of minor fights or because of a few words here and there, did you, or at least the school system didn't? Because you had no administrative role in the system at that time.

A To tell the truth, I don't really remember. I think probably those kids were rather pushed out rather than expelled.

Q That's another way of dealing with it. You ignore people who have a tendency to perhaps have problems, after a while they get the message and they leave, isn't that correct, isn't that what Oklahoma City is doing now?

Let me get into that differently.

With regard to your record of suspension, I show you what is marked Plaintiff's Exhibit 1 for identification.

MR. WALKER: Mr. Johnson, this is the suspension document, John Marshall High School. 8/29/74-3/1/75.

Q (By Mr. Walker) I ask you if you have ever seen this document before?

A It looks quite similar to some of the reports I have seen.

[p. 45] Q And I should like to have identified along with that all as a part of this same exhibit, because they relate to the same subject, some data or type data for

Northeast High School, Central Middle School, Grant High School and Douglass High School.

Can you identify these as being similar documents, presented by your administrative staff?

A These certainly look like the documents.

MR. WALKER: Mr. Johnson, I show them to you.

Q (By Mr. Walker) Now at each of these schools, isn't it true, each of these schools is majority white, isn't it?

A Yes, sir, all of them.

Q And at Marshall during that short period of time, eleven out of twelve students suspended were black, is that correct?

A That's what this shows.

Q Thirteen out of fifteen in Northeast High School were black and one was an Indian, is that correct?

A That's indicated here.

Q Central Middle School, eleven out of twelve were black?

A Okay.

Q U.S. Grant High School, all six were black, and Douglass High School, all eight were black.

How can you represent to the Court in good faith that no white students during that period of time, or at least no more than enumerated during that period of

time, engaged in conduct [p. 46] which would be by analogy similar to that that the blacks engaged in, at least to the extent which would warrant suspension or expulsion?

A The best I can figure from this, apparently the principals did not find anyone who had committed these offenses that were white.

Q Now the point is, is there anything to cause you to believe that white children are any better now than when you and I were coming up?

A I think kids are most alike, white and black.

Q You have had occasion to discuss and consider the question of suspensions, haven't you?

A Yes, sir.

Q And you are aware that this was the pattern in '73-'75, '73, '74, '73 and '72, the pattern of disproportionate suspension was there, wasn't it?

A Yes, sir.

MR. WALKER: Now I should like to have these documents introduced as Plaintiff's Exhibit 1, your Honor.

THE COURT: Very well.

MR. JOHNSON: No objection.

THE COURT: Clip them all together. Be one exhibit?

MR. WALKER: Yes, your Honor.

THE COURT: Let the record show the exhibit is received in evidence.

(Plaintiff's Exhibit 1, being document re suspensions, was received in evidence.)

[p. 47] Q (By Mr. Walker) Are you advised that there has been any changes in the numbers of students who have been suspended this school year in comparison with previous school years?

A I really can't recall about this.

Q Isn't it true that you received reports from Dr. Smith or from some other authority figure within the school indicating that suspensions in the first two months of this year are * * * down, black and white?

A Seems to me that I have read that some place, either in some of the information we have received about the Focus program or some of the other alternative programs. I read that some place, yes.

Q Now youall have had occasion, have you not, to revise your school rules and regulations, isn't that correct?

A Yes, sir.

Q You have given instructions – you don't know whether they have been carried out or not – but you have given instructions to have those revisions disseminated widely to the students and to the family members, haven't you?

A That's correct. We have been informed upon questions by the Board that they have now been distributed.

Q So that during '74-'75 you did not have any formal, well-established due process procedure, but now you have some, is that correct?

A No, sir, '74-'75 would be the past school year, yes, sir, [p. 48] we had the same type of, we had a handbook that came out in something like August of '74 that was distributed, and it had a due process in it.

Q All right, but you have revised the due process to make it more specific in the last six months, haven't you?

A We have revised it. I wouldn't say more specific; we have just changed some of the procedures in it.

Q Okay. And you have not had an opportunity to evaluate, have you, the effect or effectiveness of those changed procedures, have you, with regard to student suspension by race?

A That's correct. We have not.

Q Now if in the past your suspensions were disproportionately racial, have you sought to try to identify the causes of the disproportion and to take steps to minimize in element of possible racism in the suspensions themselves or the expulsions themselves?

A Well, the changes that have been made this year – I wouldn't say that there was racism in the past.

Q I understand that.

A Okay. I would just say that there are some different procedures this year in the makeup. One, a student who is accused of a serious offense, who faces possible lengthy suspension, there is now provided for if the

student requests it, a committee that is comprised of students and teachers and an administrator who will sit as a jury in effect and hear the evi- [p. 49] dence in the case and make a recommendation to the principal. It's not a binding recommendation to the principal.

Then if the student is suspended, then there is an appeal process. The first step in that process at the high school level is to the director of High Schools and we have a new Director of High Schools who is a black; and then beyond that, we have an appeal panel, and finally, if the student wishes, they can carry the appeal to the Board.

Q Now at this point it is too early to tell whether or not that system is going to work, isn't it?

A That's correct.

Q Now let's look at some other areas in your school system. You did indicate that youall identified extracurriculalor [sic] activities participation as a problem, didn't you?

A I did identify that was a problem.

Q Is that problem one where black girls basically have not been participating proportionately to the same extent or level as white girls?

A Looking at cheerleaders, pep clubs?

Q Yes.

A This type of thing?

Q That kind of thing.

A Yes.

Q New you have indicated that one of the possible reasons or factors that youall identified as a factor is cost, is that [p. 50] correct?

A In the cheerleader part of it, yes.

Q And the pep part of it; and that in order to participate in those things, you have to be, historically, you have to be able to go to some kind of a clinic or school for a week or two and that calls for money?

A Correct.

Q All right. And in your system you are aware that percentagewise blacks, the state of blacks, they don't have the same kind of economic ability as do the whites?

A Right.

Q Now that is just one problem you identified. Did you deal with the problem of who pays for the costs of uniforms and the cost of admissions to games, or the other things that go along with performing those kinds of roles and those activities?

A I don't think we as a Board have taken an action on this we have discussed, you know, there is a problem in here and some of the different aspects of it, instructing staff to work on the problem to try to come up with it. I understand one school has done, really, away with the pep club uniforms as such, goes to wearing scarves, very inexpensive scarf which is a very good way. They identify well with that.

One school has done it, and at least one other school has a planned program whereby blacks and whites do

participate to more or less the same extent in extracurricular activities; [p. 51] that's Northeast, isn't that correct?

A Well, at least Northeast.

Q At least Northeast, but most of them don't even today, isn't that correct?

A That's why we have appointed a Communications Specialist.

Q Can you tell the Court when you are going to make possible equal opportunities in your extracurricular activities for black girls?

A I believe we provide equal opportunity at this time. I think that there are other problems that we are working on. That's why we have a Communications Specialist. That's why we provide the activity buses after school. I think that certainly we don't have all the problems in our school system worked out.

Q All right, you do recognize cost is a factor especially if the youngsters have to pay for their own uniforms, isn't that correct, and some of those schools at the junior and senior high school level require a cost of anywhere from $50 to $200 for uniforms, because they require several uniforms, don't they, of a certain specific kind?

A The Board has had discussions on this and I can't say that they have specific uniforms or what.

Q But you do know that some schools require as many as three or four uniforms, don't you?

A I have heard that there are some schools but I don't know if it's our schools or not.

[p. 52] Q Now are you aware of that fact that you provide the male athletes all of their costs and that you don't do the same kind of thing for the girls, and that this possibly smacks of segregation; did you discuss that as it relates to the integration problem?

A Okay. I think that we pay for the expenses of the girl athletes. Okay, as far as athletes go.

Q But you don't really have an athletic program for girls on an intraschool basis to the extent that it costs money or produces money like the boys athletic program?

A We don't have any football program for girls.

Q Do you know if you have an intraschool basketball program?

A Yes, we do have.

Q A basketball program at all levels?

A At all levels?

Q Yes, sir.

A We have competition between the various schools in girls basketball. It's not blown up like boys basketball is emphasised [sic], you know.

Q But the point is that you pay for the boys to go and be gladiators in a football arena, or a basketball arena, but you don't pay for the girls, to be their supporters – I am not using this whether it's right or wrong – but you don't do it, do you?

A I really don't know the extent which we finance.

[p. 53] Q Now you are aware that in a lot of your other clubs and activities that they still manifest the same kind of exclusion for blacks, isn't that correct?

A There are some clubs which do not have a proportionate –

Q You are also aware of the fact that some of your programs, may be they are informal but maybe the coach also participates, are conducted at the exclusive area of private clubs, like tennis or golf, isn't that correct?

A Well, I'd have to check the figures on it.

Q You do know that's a fact, don't you, Mr. English?

A Well, I know that you don't have very many minorities participating in golf and tennis.

Q You do use private clubs for those functions to some extent?

A Private clubs for the golf matches or something?

Q Yes.

A I really haven't looked into that, to tell you the truth. Golf is not one of my strong points.

Q Well, with regard to transportation, can you say that the burden of transportation are equal on black and white students or do they fall more heavily upon one group than the other?

A Well, as Dr. Finger pointed out in his statement to the Court here when the Finger Plan was presented, that

the burden was, the transportation burden was heavier on blacks than on whites.

[p. 54] Q All right, that was percentagewise but not numerically. He made the point, do you recall, that if 20% of the students were black, that 40% of the students transported would be black, they would do it twice; but that basically the number of pupils within a slight variation would be equal by race, equal number of blacks and an equal number of whites – it would be a smaller percentage of whites because they have more numbers in population.

Now can you say at this time that for integration purposes as many whites are transported as blacks?

A The changes that have been made and all approved by the Court –

Q The changes that have been made? Let's deal with that for a moment because I don't know of any changes that have been made with Court approval with regard to changing the burden, the busing burden by the Court. I don't think the Court dealt with the question of burden of transportation yet.

A Well, in the first change of students, which as I recall involved Grant High School, we had to increase the percentage of blacks at Grant and as I recall we took some more students from may be Kerr Village and bused them to Grant, and that was the solution. At that time the Court, I think it was at that time, maybe it was a year later that the Court said that the burden could not be borne by the blacks in the future on this and then it was

the next year that we changed the racial balance [p. 55] of some of the schools.

As I recall the burden was either equal in changing or there were more whites. That's my recollection of the way it was.

Q Can you say now that as many whites are being transported for desegregation purposes as blacks?

A I really haven't counted up to see? I really don't have the figures on that.

Q Can you commit to the Court that two years from now that as many whites will be transported for desegregation purposes as blacks?

A I can't commit to the Court.

Q Now with regard to school closings, I notice that youall have applied for and received Court approval for some school closings and obviously the plaintiff did not object, the Biracial Committee did not object at that time; but I also noticed in yesterday's paper that youall had an auction of surplus school properties yesterday.

Were you aware of the fact that the Court told you at one time or another that you could not dispose of school property or at least school buildings that had formerly been used for educational purposes without prior Court approval?

A Okay. Let me explain to you. Yes – all right, I am aware.

Q I'll get into that. Did youall seek Court approval before [p. 56] you made this offer to the public at large

and arranged this auction, which was held on yesterday, according to the newspaper?

Did you get a court approval? Now I don't know.

A The Board has not voted to sell any property.

Q Well, who is authorized to offer for sale and release such offer for sale to the press and school buildings which have been one of the focal points in this litigation?

A Okay. I think it's a procedural matter as to whether the egg is before the chicken. We go out and if we find some buyer that is willing to buy and pay the price, then we go to the Court, would be my opinion, that we would go to the Court and say, "All right," you know, "do you approve the sale of this property or to this whatever?"

I think it might make a difference to the Court as to who we were selling property to. If we were going to sell property to a private school, I think the Court might look on it differently than if we were going to sell it to a CAP program.

Q But now are you aware of the necessity to get prior court approval before contracting to dispose of property?

A I think we have not contracted to dispose of property.

Q Well, you did, did you not, make an offer – and I won't argue with Mr. English. I apologize if I seem to be.

Will you state to the Court what you did on yesterday?

A Well, if I can back up just a little bit?

[p. 57] Q All right.

A And explain that – all right, we have about twenty-two pieces of property that are either just barren land we have to keep moving or a vacant building, or buildings that were formerly school buildings that are now in housing programs such as CAP, Neighbor to Neighbor, other community programs; and the Board and the administration have proposed that we investigate the possibility of selling this property, notifying those people who are the occupants of the land or the buildings of that time of our intentions.

And so yesterday, having done this within the past couple of weeks or the past month anyway, okay, we did solicit proposals or bids on at least one piece of property that I can think of right off, the old Carey Building which is at Southwest 29th and about Portland.

There were several people interested in that. The Board heard the people last evening, voted not to sell any of the property that is now occupied, and of course at all times the Board was well aware as we have always been that we cannot dispose of property without the Court's prior approval, and that when we took, when we made the solicitation of bids that, first off, that didn't mean that we would sell to the highest bidder because if that bid were not high enough, for one thing, we would not even consider it going on to the Court – with the request that it had to be a good bid and then "You decide really [p. 58] whether you want to sell the property or not." So far it has all been a preliminary move.

Q Did you make an offer to the people in the community at large about the availability of the building, did you disclose that rather these buildings were on the market, that you were inviting bids?

A The Board discussion was that we would offer these properties or solicit a proposal from the group that was in the building at the time, okay, and see if they were interested, if there was anybody else interested in it.

As I recall there was some discussion about putting a sign out by the property to say, you know, "This property is for sale", but as far as advertising in the papers or something of that nature, the Board did not do that; and in the discussion with the Superintendent last evening, he has indicated that in the future probably we will advertise, not in the Law Journal, the very exclusive Law Journal, but instead in newspapers of general circulation.

Q But there was some limited advertisement, wasn't there?

A There was publicity on it certainly.

Q Did you in your publicity ever disclose that the bids that would be made by these persons, some of which would be costly to those persons who were bidding, would be subject to Court approval in the desegregation case?

A I really don't remember that it's in there. There is some [p. 59] general statement that says, you know, that just because you are bidding doesn't necessarily mean you are getting it. That's my recollection of what that says.

Q Could you tell the Court what else you plan to do to eliminate the rest of the segregation and discrimination that remains within the school system which you have already discussed and described?

A Well, I think we will continue the efforts that we have. Where we see problems arise, where we see needs, hopefully before the problems become all that evident that we will continue to divert manpower into those areas.

Q Are there areas where you feel that you should divert or devote manpower now?

A Well, truthfully, my feeling is that one, we need a much stronger human relations program.

Q You still have needs of a desegregation nature that remain in this system; we cannot be assured that six months from now you will be Board president, or that this same Board will have the same attitude it has before the Court today, can you?

A We are not in Utopia yet, no, sir.

MR. WALKER: Thank you.

THE COURT: Mr. Johnson?

REDIRECT EXAMINATION

By Mr. Johnson:

Q Mr. English, referring to the innovative school, I believe [p. 60] the faculty, there are now nine on the faculty at the innovative high school, is that correct?

A I believe that is correct.

Q How many of those are black?

A May I refer to notes on that? My recollection is there are two blacks – let me back up a minute here. I think maybe there have been eleven staff people now designated for that school and awaiting for enrollment, the enrollment process or the lottery is this Thursday night, and then see if they have the 220 students.

Q Wasn't it stated at last night's Board meeting that there were nine and that two of those were black?

A That's my recollection. There was some discussion also of eleven being designated now.

Q Eventually?

A Yes.

Q Now on your courses that are offered in the course of study in the high school, is it correct there are two types, one is elective and the other, required courses?

A Yes, sir, that's correct.

Q Counsel mentioned several courses as not having very many blacks, Trigonometry and Chemistry – those are what are called elective courses, is that correct?

A Yes, sir, that is correct.

A And those are not compulsory and it's up to the individual [p. 61] students as to which of those that he does elect?

A That is correct. The student has his choice.

Q Has the District had any policy of doing any more than suggesting that they take any of these courses,

these elective courses; in other words, do you know whether there has been any policy to encourage the taking of particular elective courses by students?

A I really don't call it policy. We have made some changes in the Chemistry – well, the Science courses this year, in hopes of attracting more students into Science courses.

Q Now on the subject of suspensions, who makes the initial decision on a suspension from school?

A Well, as I understand Oklahoma Law, really the principal of the person whose decision it is to suspend students from school.

Q I believe you did testify that you attempted to have due process safeguards on suspensions?

A We have worked diligently on that. If I could go back to the previous question, I might also point out that at John Marshall High School where counsel pointed out that there were a number of black students and not very many white students who were suspended from school, the principal at John Marshall High School is a black.

Q Now there is a process where an appeal can be made to the Board of Education eventually from any of these suspensions?

[p. 62] A Yes, sir.

Q Can you tell within the last year approximately how many of these students that have been suspended have actually appealed eventually to the Board of Education; I will ask you if it is not just relatively few?

A It is very few. I can only think of one case where we had a student come before the Board appealing.

Q But that remedy has been available at all times?

A Yes, sir, it has.

Q Now referring to the sale of property, did I understand you to testify that you were just asking for bids, were not offering to sell the property?

A That's correct.

Q In an attempt to find out what price for it would be available if you decided to sell it?

A Yes, sir, there was no guarantee that we could sell the property.

MR. JOHNSON: I believe that's all.

MR. WALKER: Just one or two other questions, your Honor.

THE COURT: Yes.

RECROSS EXAMINATION

By Mr. Walker:

Q We have a number of elective courses in Marshall and the other high schools and in the junior high schools. Now has the [p. 63] Board formulated a policy as to why those courses are elective or just which courses will be elective; what is the rationale for having any electives?

A Okay. There are certain requirements by state law as to what courses a student has to have. As to why we have elective courses?

Q Yes, sir.

A Again I think it's to meet the needs of the students, whatever those needs are, and that is, if I may continue a little bit, one of the ways we determine what courses are offered as far as electives go, my understanding is that at the first, or during the school year before the schedule is made up for the next year, the students are given an opportunity to express in writing what courses they are interested in having for the coming year, and then you draw up your schedules and send out this information to the students, permitting them to sign up for courses.

Then it goes into the big computer and out it comes.

Q All right, but you don't know what standard you use for even having electives other than student choice, do you?

A No, I really – in the past the Board has left curriculum to the Administration.

Q I see, and you have no way for determining the relatedness of that to the purposes of education generally, do you?

A The Board at this time has the motion which is a statement [p. 64] of purposes for the School District upon which we will build these other things as to whether a subject – you know, it is unfortunate that we don't have already a statement of purposes. We have had a management study and this is one of the things they said, the first thing you need to do is find out what you are about.

Q Then the question really is that you don't know what you are all about in terms of the education that you

are offering to your children, isn't that correct, outside the required courses?

A I wouldn't, I wouldn't say that really.

Q But that's what the management study has told you, isn't it?

A It says that there is no written statement of purposes. Obviously we work from some agenda.

Q What is it?

A Whether it is written or not.

Q What is it?

A I think that we'd have to say it's a very broad based term of, you know, quality education, meeting the maximum potential of the students, providing equal education for all the students in the system.

Q Let's look at what that does, when you start talking about adding electives to the students, you are talking about economy in operating the school, aren't you, you are talking about [p. 65] maximizing the value of the dollars, you are talking about trying to achieve some social purposes by affording students an opportunity to have certain education; right?

All right, what is the economy of allowing one teacher, Mrs. Marian Swindle at Marshall High School, the privilege of having twenty-five students in English 1 through 3 over a six hour period?

Now what is the economy in that, six classes, twenty-five students for one teacher?

Let me give you another example which may be a little bit easier to relate to.

What is the economy of offering a full class for Latin 3 when you only have five students in it? Are there educational benefits to all of the students in the community?

A Okay. I don't think economy is what we operate for.

Q Well, my point though to you is, do you not see some racial pattern here? I am not saying that you happen to be economical or wise in your decision-making – you could be silly or what-have-you, I'm not saying that either – but as far as racial discrimination is concerned, can you see the pattern where you let white students or at least have elective courses which are attended basically by white students, all of which have a much lower teacher-pupil ratio than do the basic courses; is not that the same kind of thing that you are doing with the specialized high school?

[p. 66] A My understanding is that we in some classes of a basic nature provide a lower pupil-teacher ratio than in other courses, in addition to those, you know, in advanced.

Q All right, let's look at Marshall, and I want you to bear in mind the electives over against the basics. German 4, one teacher, one student to one teacher. That's Beverly Mills.

German 3, one class, three students to one teacher. Those of course are white students.

You go throughout this and you see a whole batch of examples of one and two students in a class, all whites.

A Well, if I may, and I don't know this, but here's another course of Vocational Auto Mechanics 2, whatever that is. There's a class with three students and one of them is black. I assume that there's a good educational reason why we had three students in Advanced, or Advanced Auto Mechanics.

Q I understand you assume that you have good reason. I will accept that. But you don't know what that good reason is. Okay.

Now can you commit to the Court – first of all, you do know, we were talking about on direct and on redirect some of the staff again – you are aware, aren't you, that in your specialty staffing that you still have patterns of racism, racial discrimination, that is to say you have a disproportionate number of coaches, football perhaps at the black schools, formerly black schools, who are black, and throughout the system [p. 67] you don't have the same kinds of proportions of blacks in coaching at the high school and junior high school level, head coaching; you are aware that in the bands, choir, other places like that, specialty jobs, blacks do not have their percentages as they have within the school system as a whole, are you not?

In other words, what I am saying is that youall have got your quotas but the blacks are basically structured into a narrow line while the full range of opportunities is open to whites in terms of superintendent jobs, in terms of principals of the new schools, preferential coaching positions; isn't that correct, sir?

A I don't know that I could go with all that statement there that way.

Q But you could say that that is substantially correct by your observation as Board chairman, isn't that correct?

A I would say that the statistics are there and I am not going to argue with statistics. The reason behind the statistics, I think that the Administration can probably help you out.

Q Can you commit to the Court that you at least will establish an objective and work toward that objective immediately and into the future, whereby all of your specialty programs will be staffed in more or less the same kind of numbers up and down the ladder, as the blacks and whites happen to fall in terms of their numbers in the school system as a whole?

A I think that the Board endorses that concept.

[p. 68] Q But have you done anything, can you say to the Court that you are going to deal with that and make your administrative staff implement it?

A I think as vacancies occur that this is being done.

Q All right, but I am not talking about today. Can you commit to the Court that if it is not happening that you will see to it, without court jurisdiction, that it does happen?

A We have that commitment.

Q You now so commit to the Court?

A We have expressed these same feelings to our Superintendent.

Q Have you reduced them to a Board resolution, and will you do so?

A We have passed several resolutions in the past. I am really of the opinion that we have done this in the past, but if it would make you feel better, well, I am sure that the Board would, you know, go along with that because it's fair.

MR. WALKER: Thank you.

THE COURT: Any further questions?

MR. JOHNSON: No, sir.

THE COURT: I guess this concludes your testimony, Mr. English. The Court would like to say all I know about you, all I know about the other Board members, is what I read in the paper except what I have seen and heard here this morning; and the Court is glad to express to you that to me your attitude of [p. 69] constitutional compliance in the operations of the schools is much, much better than it has been in past Boards.

The Court would like to ask you, if the Court should terminate its jurisdiction, will this mean that the Board will terminate its busing program for desegregation?

THE WITNESS: No, sir.

THE COURT: Would it mean that you would lessen your busing program to any degree?

THE WITNESS: No, sir.

THE COURT: Do you know of any other way in which you can bring about desegregation except through busing?

THE WITNESS: I think that it's certainly going to require transportation of some sort, busing of some nature.

THE COURT: This is a must?

THE WITNESS: As to whether this plan or some other plan –

THE COURT: Now last year, the Court would like to ask you if you know – I don't know whether you know – the Court on recommendation of the Biracial Committee and the data that I read of the Board's action on the Biracial Committee, the Court directed that you make certain superintendent changes, that is, superintendent of high schools from Northeast and Douglass and John Marshall and Grant. This was done.

The Court now asks you, was this harmful to the school system?

[p. 70] THE WITNESS: No, sir, I don't believe it was.

THE COURT: Was it in some way an aid to the desegregation of the schools, in your opinion?

THE WITNESS: My personal feeling before the Court handed down its order was that this would be a beneficial thing. My objection was that the Court did it instead of the Board.

THE COURT: The Board did have an opportunity to do it.

THE WITNESS: The Board did have that opportunity and did not.

THE COURT: I have read your report. Do you have any further statement that you would like to make for the record outside of what the lawyers and the Court have said? The Court would like to hear you, just a free statement if you want to.

THE WITNESS: Okay. Thank you, your Honor. If I could refer to notes?

THE COURT: Yes, you may.

THE WITNESS: Well, I would say that of course we want to operate – we feel like that we can handle our problems and our responsibilities without court jurisdiction.

We believe very sincerely that we are operating a unitary school system. I really believe that the court order, the presence of the court order stifles in a way the creativity [p. 71] within the school system and I will cite one case.

When we were, as a Board, debating the innovative high school, the Superintendent at that time used as a reason for us not to set up such a program, was a concern that the Court would reopen the entire Dowell case, hold a hearing and reopen the whole thing, and the fear was that the Court might order some brand new plan on the District.

I think that this is inhibiting to people within the District, as far as administrative people maybe, our staff, that feel like there is no reason to try to have different things sometimes because of the little fear that maybe the

Court is not going to approve it or that it would in some way cause a shakeup within the present plan.

I think that also the community in some sense has faced reality in this and accepts, although not liking necessarily the Finger Plan and busing; but the community has now come around to accept reality. I think that actually the court order creates a bad image or, yes, it is a bad image for the School District, for our community. It indicates to the people outside of this District the lack of responsibility on the part of the Board of Education. I think that's the way it is interpreted.

Also people who do not want to be involved in court ordered busing, if you will, may go to suburban communities and even take businesses or industries that might even locate [p. 72] outside of Oklahoma City or encourage their employees to live outside Oklahoma City, which would and I think does really defeat the purpose of the court order which is to desegregate – integrate the school system.

That if you have fewer whites coming into the school system it is going to make integration that much more difficult and I think that this School Board will operate in a very responsible manner out from under the Court's jurisdiction recognizing that, certainly, as I said before, there's a possibility of a lawsuit if we are not doing the right thing. There is also HEW which has its own Office of Civil Rights, its own standards, which they can keep very good tabs on us, I would say; and federal money is certainly a big incentive to do the right thing.

And that would be my statement.

THE COURT: The Court appreciates your statement, appreciates your views. Of course the Court feels as though the Court exercised no absolute control or no absolute jurisdiction over the activities and operation of the schools except to see that you do desegregate the schools, and up to now or up to the Finger Plan, I think everyone would agree that the schools were not in compliance with the constitution.

But since the Finger Plan has been in operation, and it took a long time to get it into operation, the situation is improving but I don't see how that outside of the thought of [p. 73] the Court having an order over the School Board to constitutionally comply with desegregation of the schools, the constitutional requirement – but I can see where the very fact that the Court is controlling jurisdiction has an effect upon the public and it has had a tremendous effect on the public.

As a matter of fact, our public here, as I view it in Oklahoma City, is that the whole busing program should be terminated and desegregation should be terminated.

But I do appreciate your statement. As I said earlier and in the beginning, the sooner the better for me and I can do this when there is proof of constitutional compliance today and tomorrow.

All right, you may step down.

(Witness withdraws)

THE COURT: It is now almost 12:00 o'clock. Will it be agreeable to everyone if we take a recess until 1:30? Does anyone object?

We will take a recess then until 1:30, at which time the Court will hear further testimony.

Court is in recess.

(The noon recess is taken.)

[p. 74] AFTERNOON SESSION

November 18, 1975

THE COURT: Are you ready to proceed, Mr. Johnson?

MR. JOHNSON: I would like to call Dr. Smith to the witness stand, please.

THE COURT: Very well, Come around, Mr. Smith.

THOMAS J. SMITH,

called as a witness on behalf of the defendant, being of lawful age and having first been duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Johnson:

Q Will you state your name and official position with the Oklahoma City Public Schools?

A Thomas J. Smith, Superintendent, Oklahoma City Public Schools.

Q And how long have you been Superintendent?

A Since July 1, 1975.

Q What position did you formerly hold?

A Immediately preceding that, since 1968, Assistant Superintendent, Oklahoma City Schools.

Q And what has been your other experience in the Oklahoma City Public School System?

A Assistant Principal of U. S. Grant High School for four years; Director of Purchasing for the School System; Assistant [p. 75] Business Manager; Director of Research and Statistics; and Assistant Superintendent and Superintendent.

Q What degrees from institutions of higher education do you hold?

A Bachelor of Science in Education from East Central State University at Ada; Master of Science in Education from Oklahoma State University; Doctor of Education from Oklahoma State University.

Q Have you made any studies or had any experience in the field of school desegregation and integration?

A Yes, sir. In addition to keeping informed, keeping current with the provisions of desegregation, in 1969 and '70 I was assigned the specific responsibility of working with agencies, organizations and individuals and others in trying to establish or develop a plan of desegregation to be utilized by this school system, or the Oklahoma City School System.

Q Have you had occasion to have conferences and consultations with the Office of Civil Rights, with people in the U.S. Department of Health, Education and Welfare?

A Yes, sir, on several different occasions as well as conferring with a consultant from the University of Oklahoma, working also with HEW officials in Dallas, Office of Civil Rights in Dallas.

Q Dr. Smith, are you familiar with the order that was entered in this case on February 1, 1972 that adopted a school integra [p. 76] tion plan?

A I am.

Q Can you state whether or not to your knowledge this order has been complied with?

A To the best of my knowledge it has been complied with.

Q Can you state whether the Oklahoma City Public School System meets the standards and guidelines of the Office of Civil Rights, to your knowledge?

A Based upon my impression and my interpretation of those guidelines that they have established, we do meet those criteria.

Q And was the defendant's last Biannual Report, the report that was filed in this case on October 31, '75, prepared under your supervision?

A Yes, sir, it was.

Q And was the information given in the report correct to your knowledge?

A To the best of my knowledge it was.

Q Are the figures and statistics in the pupil membership by race and grade, by school, by class, certificated personnel, as shown in the report, the latest figures that we have?

A Those are the latest official published data. We do have the current data or the data that is in the data based of the Computer Center.

I might indicate that last week I did check the information [p. 77] and data and that basically is the same as that in the report on the pupil population.

I might indicate that one exception that could be brought to the attention is that of Harrison Elementary School, a K-4 Center; the racial composition of that school, the percentage of blacks has decreased slightly.

Q And can you state what the reason was for that?

A Yes, sir, the loss of one black student on the roll and the increase of one white student made that kind of change in the overall percentage.

Q Dr. Smith what are the procedures for suspension of students from school in the Oklahoma City School System?

A Mr. Johnson, we have some two different types of procedures for suspension. I might indicate that one is what we refer to as summary punishment. This is suspension of not more than three days in case of an infraction of some policy or regulation. The student is informed of the nature of the charge. The student is given an opportunity to present his side of the story.

If after hearing the student's side of the story the principal is of the opinion that it will be to the advantage, or that the student is guilty and it would be an advantage to bring about a change in behavior, he may be suspended and many times his suspension pending parent conference with the parent of that student.

[p. 78] The other type of suspension is what we refer to as lengthy suspension. In these cases it's more than three days. Discussion is held between the principal or the administrator of the school and the pupil. Again the pupil is given the charge for which he is being considered for suspension. He is given an opportunity to present his side of the story.

If the principal still is of the opinion that there is reason to believe that the student is guilty of the infraction, he may be given a summary suspension pending a formal evidentiary hearing. The student is given the option of requesting a hearing even before a committee, or he may be heard before the principal or an assistant principal.

The hearing is held within a three day period of the alleged violation. At the end of that three day period of time the guilt or the innocence of the student is decided.

I might also indicate then that the procedure for appeal is such that he may appeal that decision to the appropriate director, then to the assistant superintendent, superintendent, and to the Board of Education.

Q What are the policies or procedures for transportation of students?

A The basic concept behind this is to establish the routes for transportation services that follow the most convenient or most logical and most direct route to the school to which the pupil is assigned, from the area in which the student resides.

[p. 79] Q Can you state the names, grade level or general location of schools that have been closed since the Finger Plan went into effect?

A Yes, sir. in 1973-'74, Henry Elementary School was a K through 5 or K through 4 Center was closed. That is located at 5700 South Broadway.

In the same year, Page Fifth Year Center, located at 319 North Geary was closed.

In 1974-'75, Central Middle School at 817 North Robinson was closed. It is reopened as the Innovative School for the '75-'76 year.

I might also indicate that Central Middle School was assigned to the Moon Center, which formerly was the Kennedy Junior High that was closed by the Finger Plan, and then had been utilized the previous year as a Center for the trainable or handicapped pupils; and for the '75-'76 school year then was opened as a middle school.

In addition, '74-'75, Dunbar Fifth Year Center, located at 1432 Northeast 7th was closed, with those students being assigned to Edwards and to Page-Woodson School.

I believe that would include those schools that have been closed. I might indicate further that all of the closings were approved by the Court prior to the official designation of the closing.

Q What considerations were there for closing the schools?

[p. 80] A Closing of these schools primarily was based on the loss of attendance at those units, with the exception of Central, and that school was moved to a newer, more modern facility, one that was constructed for pupils of the middle school age, and also to make room for the innovative school to be established at Central.

Q Is the implementation of the innovative school being monitored?

A Yes, sir. Built into the plan is a program to make an assessment and an evaluation and a perpetual monitoring of the program.

I might also indicate that built into the selection process of students is a procedure that takes into consideration the grade level, the school from which that student is assigned, the sex and the race.

I might also further indicate that the plan does specifically indicate that under certain conditions three of those factors might be altered, but it also very specifically states that the racial factor cannot be altered.

Q What is the racial composition of the faculty or staff of the school?

A Those currently assigned and working at Central, we have nine total certificated staff members, with two of those nine being black.

We do have eleven that are designated for that should the [p. 81] enrollment materialize, with three of the eleven being black.

Q What testing devices are used in student placement in the Oklahoma City School System?

A I might indicate that we have tests administered for the assessment and placement of pupils in some eleven different programs, ranging from a regular school program to the educable mentally handicapped that are trainable, the trainable support, physically handicapped, multi-handicapped, partially sighted, the blind and hearing impaired, learning disabilities and the emotionally disturbed.

I might also indicate that these are grouped into major types of tests, those being intelligence tests, the perceptual motor tests, the visual processes, the auditory processes, and the language development.

Our system currently is using some twenty-nine different tests or batteries of tests in the assignment or placement of pupils in classes.

These tests are generally those that have been standardized on a national or regional basis, and do have the validity and reliability factors that have been established.

Q How are students assigned to a particular class in an elective course?

A Students enrolled in the spring for the classes for the following fall, each students [sic] in a high school is provided with a schedule of all those classes that may be offered in an [p. 82] individual school. They are provided with those basic courses that are provided either by state law or local Board policy for graduation from High School.

They are also given information by their counselors related to the courses of study that are recommended if they are pursuing a particular career, if they plan on going on to college, if their program is going to be determined as a terminal educational program or an entry level program for other training.

The student then selects a designated number of courses and normally the student will carry some five or six classes. However, they are required to list, and I am not sure of the exact number, some eight or nine courses.

That schedule then is submitted to the Computer Services Department and the computer is utilized to schedule those students, each student into a class, with a limited number of conflicts in that schedule then minimized by the computer schedule.

The elective courses then are just as they are stated. They are not a requirement for graduation and the student may elect to enroll in that specific course.

Q What is the policy for transferring students from one school to another?

A When we are talking about transfers we are really talking about those legal transfers, and to further clarify that, that [p. 83] would be the transfers that are interdistrict or between districts of the county. Those are under the auspices of the County Superintendent of Schools. By state law he has that responsibility or that office has that responsibility.

The other type transfer is the intradistrict, or what we refer to as our special transfers.

I might indicate that any pupil desiring may submit an application for transfer. However, to obtain that transfer or for it to be approved, there are some very specific reasons for which it may be granted.

One is to obtain a more appropriate educational program. Really that is saying that the program, the course of study, is not provided in their home school, and they may, if space permits, be transferred to a school that does offer that course of study and I might give an example of that.

The vocational agricultural program at John Marshall is somewhat unique to the system. Therefore a student at another school desiring to take vocational agriculture could enroll in John Marshall if space is available.

I might also indicate that to make it possible for members of the same family to attend the same school, again if one member is transferred because of a special education class and that same grade level is taught at that school, if space is available in that building and that is by a pre-determined space factor, then that other member of the family may transfer [p. 84] along with it or if we have a member that attends a licensed nursery program, other members of the family may attend along with that pupil that is attending the nursery program.

We also have a provision to allow a pupil to complete the year at a school even though he may change residence during that school year.

Another is, as I referred to, the assignment of pupils to special education classes. The other is to allow a

student to attend a school in which the licensed nursery is located.

We have had a provision in past years and with the fact that we have very few schools where the black race is in the majority, it really is a minor reason now, but the majority to minority transfer is as it states, those schools where a pupil is attending a school where his race is in the majority may transfer to where his race is in the minority.

We do have factors such as hardship, where food, clothing and shelter is threatened, and under this the documentation is required; the safety factors, hazardous walking areas for an elementary age pupil particularly, and I might say this is after consultation with a representative of the Oklahoma City Police Department, to confirm that they agree that this is a hazardous condition.

Those medical reasons on those transfer applications must be recommended by a medical review committee which has been established by the Board of Education.

[p. 85] Another is to improve the racial ratio by complying with the implied intent of the federal court order. As an example, if we have a school where the ratio of blacks is nearing the upper limits of the allowable factors, we may transfer a black student from that school to one where the racial composition is primarily white, and could improve the conditions there.

And then the other is where Juvenile Court order decisions or the Juvenile Court directs us to assign a student to a particular school.

I might indicate that all of these reasons have had prior approval. They have been submitted to the Court for consideration and have had prior approval.

MR. JOHNSON: I believe that's all.

CROSS EXAMINATION

By Mr. Walker:

Q Dr. Smith, we have been in this a long time now.

Can you tell the Court what the difference is between this Board and the Board that you were working under in 1969?

A My primary difference, Mr. Walker, would be the fact that I was an Assistant Superintendent at that time and now the Superintendent, and have a more direct role or relationship in working with the members of the Board.

In 1969 the relationship or the communication with the Board was through the then Superintendent of Schools.

Q As I recall in 1969 - 1970 or thereabouts, you were more [p. 86] or less the Board desegregation expert; is that your recollection, too?

A I was assigned the responsibility of work in the desegregation field, yes, sir.

Q Do you feel that Board at that time sought in good faith to implement the requirements of this Court?

A Mr. Walker, I am of the opinion that at that time they were implementing what their interpretation was of

good faith at that time of compliance with the court's order.

Q Was the Board which succeeded that 1969 Board in your judgment operating in good faith, pursuant to this Court's instructions?

I don't know what time the Board changed but apparently between '69 and '72 it changed. Now did that Board, whichever the change was, operate in your judgment in good faith?

MR. JOHNSON: Your Honor, we object to that question going into this opinion about good faith. I don't think it's a proper question.

MR. WALKER: Your Honor, I have some difficulty with the question, too; but Dr. Smith is suggesting to the Court, I think through the motion, that there is some reason why the present composition of the Board gets us from past composition of the Board insofar as philosophy is concerned. I am trying to get some notion of what point in time –

THE COURT: Well, to answer this question may be [p. 87] embarrassing to him, and I don't see how it is going to help me, that is the Court, because not only do I know in my own heart and mind but I do feel and the record will support it, I think, that this present Board and this Superintendent have an entirely different attitude toward desegregation and their attitude is more compatible to the constitutional requirements.

If you think it's helpful to you or to the record, you may proceed but I don't think it's helpful to me because I

really stayed awake many nights wondering about the old Board.

MR. WALKER: All right. I want to be helpful to the Court. I think the record in that way will be properly developed.

THE COURT: I think so.

Q (By Mr. Walker) Now Dr. Smith, do you recall previously testifying that you felt that the school system was properly fulfilling its obligation under the constitution; each time you testified you testified in support of whatever plan was in operation at that time, haven't you?

A I have testified that we were implementing those in good faith and in our opinion they were in compliance with the constitutional requirement, yes, sir.

Q In fact you were doing that not only because you believed it but because that was the policy that you were employed to take, isn't that correct?

A Primarily because of my belief, Mr. Walker.

[p. 88] Q But you believed back then in 1969 when you did not have more than a handful of black students in white schools under freedom of choice that that met the requirements of the law, didn't you?

A When we submitted the plan in '69 and '70, it was the opinion that that would satisfy the requirements, yes, sir, of a desegregation plan.

Q And so that at all stages of the game, whatever plan has been submitted by the Board, you have had substantial input into it, haven't you, except for the Finger Plan; isn't that correct?

A In most cases, yes, sir, Mr. Walker.

Q Isn't it true to this date you have yet to present to the Court an alternative plan for desegregation to the Finger Plan, which would achieve more or less the same results as the Finger Plan?

A It is correct that we have not filed or submitted an alternate plan to the Finger Plan.

Q Now do you have in your own mind any alternatives, in the event that the Court does, let us say, well, that you come up with another alternative just as effective?

A Mr. Walker, I am not sure that anyone is proposing that we would necessarily eliminate the Finger Plan now. I think there may be improvements on it, but as far as any specific plan, I would not have a plan.

[p. 89] Q Now you use the term "necessarily" eliminate the Finger Plan.

A Right.

Q You do recognize by the Court's withdrawal or relinquishing jurisdiction there may be a move underway to do that, do you not?

A Yes, sir. However, I am also aware that we have guidelines and regulations with which we must comply. We are aware that we would be under the watchful eye of others during this process.

Q You are suggesting to the Court that you would rather be under the watchful eye of HEW than the Court, is that correct?

A I am saying that there are some advantages, I feel, for this school system not to be under the jurisdiction of a court, yes, sir.

Q Are you aware of the fact that HEW has been held by a Judge in the District of Columbia not to have enforced in the southern state the non-discrimination provisions of the Education Act; you are aware of that, aren't you?

A (Nods affirmatively)

Q Are you aware of the fact that that case is styled Adams versus Richardson, Adams versus Weinberger?

A Right.

Q And now Adams versus whoever the Secretary of HEW is?

A Right.

[p. 90] Q And you are aware, are you not, that the basic charge is that HEW does not protect the rights of black children to the extent that the courts have done or the constitution requires, are you not?

A I am not aware of the last charge you made that it does not protect the minorities.

Q Then you are not really familiar with Adams versus Richardson?

A I have read the case, yes, sir, I have.

Q And did not Judge Pratt find in that that HEW was not enforcing the law?

A At that time that was correct.

Q And is not HEW under injunction now to come forth with a plan to enforce the law?

A That is correct.

Q And no plan has been approved by Judge Pratt for enforcing the law, has it?

A I am not aware of any.

Q So you are asking this Court to allow, at least to relinquish jurisdiction so that you can go and be placed under HEW's jurisdiction where there is no plan for enforcing the provisions, the non-discrimination provisions of the law?

A I am not saying that we are asking the relinquishing of the case here and then that we go under HEW. I am saying that we are aware that we will have guidelines and regulations, and [p. 91] which we must follow. The point here is to ask for the motion to dismiss the case.

Q Is one of those reasons the belief that guidelines of the administrative federal agency would be less stringent?

A No, sir.

Q If you are going to be under guidelines anyway, what difference does it make whether you are under HEW or the Court?

A I think the negative image that might be associated with being under court supervision or jurisdiction, as far as this community is concerned, is a drawback to our school system.

We are trying to project a positive image and I think this, in a sense, makes that goal, that task more difficult.

Q Can you as Superintendent commit this District that it will maintain a racial balance in all respects in the school system for the foreseeable future?

A I can make a commitment only on behalf of myself and the administrative staff, that certainly we are committed to the desegregation and to the provisions providing the integrated education program for our young people.

Q I see, but can you make a commitment now that that will be the commitment in five years or eight years?

A No, sir, I can't make a commitment beyond July 30th of this year.

Q That's right. Now what is the length of duration of your contract?

[p. 92] A One year.

Q And what is the date that you entered into the present term of that contract?

A July 1, '75.

Q So that you have practically three, well, several – six months, seven months to go?

A On this contract, yes, sir, and by Oklahoma state law you can have only a one year contract.

Q Now Mr. English, the Board chairman, when does his term expire?

A As I recall, Mr. Walker, he is up for reelection in January of this year.

Q All right.

A Of this coming year.

Q So that we really, with regard to you two people, can get no assurance at this time that youall will be there beyond January of next year, except that your contract will be paid through July or June of next year, is that correct?

A I can only assure you that I will be here through June 30, that's right.

Q Now with regard to your knowledge about the law, Mr. Johnson asked you if youall were in compliance. Each time you testified you told the Court that you were knowledgeable about the law, haven't you?

A Yes, sir, our interpretation of the law.

[p. 93] Q And each time in the past you have been wrong, is that correct?

A No, sir, I am not saying that we have been wrong, no, sir.

Q With regard to school closings, you say that the Court has approved the closing of certain schools. That is really not exactly accurate, is it, in that the Court suggested or at least approved a policy in the Finger Plan of suspending from operation for the time being those schools where capacity was unnecessary for the desegregation program; and the Court did not say that you could permanently close those schools, did it?

A Each time we have proposed closing schools we have submitted those to the Court for consideration and for approval to close those schools.

Q But you never suggested to the Court that you wanted to close them permanently for all times as educational facilities, did you?

A No, I am not sure we said permanently and for all time.

Q Now with regard to the closings, it is true that you do not have a uniform standard for determining school closings other than the degree of enrollment within the particular school?

A We do have now the other factors of the cost of the utilities, cost of services, cost of maintaining buildings, the quality of the program as offered in those schools. Sometimes it is determined by the number of students enrolled in [p. 94] that school. We do have additional factors now.

Q Have you sought approval of the Court for the use of those factors in determining which schools will be closed?

A At the present time we have not.

Q So that the only factor that has been approved by the Court thus far for the school closing, isn't this true, is the factor of obsolescence or under-utilization; isn't that right?

A I would say that the closing of Central was not for that purpose, and the reestablishing of the program at Moon would not have been for that purpose.

Q That's right, so what I am simply saying, that you have been doing things with regard to school closing pursuant to no court approved standard, even though the

Court may have said "Okay" because there was no objection to it by the Biracial Committee?

A I am not aware of any court approved standards for the closing of schools.

Q You are aware that you have to have standards for school closings, aren't you?

A And we do have those.

Q Can you explain to the Court why a school which is capable of being utilized, not only now but into the future for ten or twenty years, has to be permanently closed merely because enrollment drops below a certain amount or percentage?

A I'd say, Mr. Walker, the fact that some fifteen or sixteen – [p. 95] no, some twenty-five thousand to twenty-six thousand students loss in pupils within the school district means that there is not need for facilities that were once present in this school district.

Q All right.

A At one time some seventy-five thousand or seventy-six thousand pupils; at the current time we have approximately fifty thousand pupils in our school system and therefore would not have the need for the numbers of classrooms or facilities that we had at the time of our peak enrollment.

Q All right, so need is one factor. Now youall do have the power to shift students to cause enrollment to be more or less the same percentage within each school, don't you?

A As I understand, with the Court's approval for those reassignments of students.

Q So that if enrollment in one of the schools in the black area gets down to the point of like a hundred in a school with a capacity of five hundred, you have the power to not necessarily close that school but at least to shift some students, as you shift black students for racial purposes, to shift some white students, perhaps, into that school to bring it up to a more efficient operating, more economical operating level, is that correct?

A With the exception of Douglass and Moon, Douglass High School and Moon Middle School, the schools located in what you [p. 96] refer to as the black community are Fifth Year Centers, and all white students are now currently assigned to those schools.

Q I see, but isn't it true that in your twelve grade organization structure that one area where the percentage of enrollment is the lowest of both races is the fifth grade?

A I believe it probably will show that.

Q All right, so that we know that if white youngsters are being told by the Plan and the way youall are operating it, that they don't have to stay in the "black community" but one year, that they can go outside the school system or in a private school or what-have-you for that one year and then come back in the sixth grade or seventh grade – cannot you adjust a plan to make those Fifth Grade Centers so as to get, dealing with a closing factor, Fourth and Fifth Grade Centers, Fifth and Sixth Grade Centers; I mean have you considered that option?

A Any modification I am assuming we would come back to the Court for the approval there for any modification from the Finger Plan.

Q What I am suggesting to you is that instead of closing the schools in black communities, Fifth Grade Centers, because they are not up to population, that you have some other options and that you have not submitted those options to the Court which good faith I suggest would require.

Is there any particular reason why you haven't sought to [p. 97] maintain educational presence in the black community to the same extent, in terms of buildings, that it is maintained in the white community?

A I would say the major difference in the maintaining of the buildings is in the age of the facility. Those buildings of comparable age are in comparable condition of those in the Fifth Year Centers currently. Certainly we make no distinction in the maintenance of those because they are in one part of the community or another.

I might also state that we believe in the Fifth Year Program. I think it's a good quality educational program that is offered in those schools, and certainly the fact that the loss of the students is there, that would reduce the number of students available to enroll in those schools.

Q Do you see, though, where we are going? I mean you close schools merely because the enrollment is low, are you not telling the white community that you can close every school, since every school still has to be majority white, that you can close every school in the black community by their merely not going to it?

A I think I ought to mention, though, that we have closed schools not only in that community but in other sections of the community as well.

Q I understand, but the majority of the closings have been in the black community, haven't they, Dr. Smith?

[p. 98] A There really have not been that many closings. There has been one elementary that's in a predominantly white area, and two Fifth Year Centers, with one of those being reassigned, and then the Central program being moved from Central to the Moon School.

Q Was Henry located in the black community?

A No, sir, Henry is in the south part of Oklahoma City.

Q Page?

A Page is in the northeast side. That is in the black community.

Q All right, but Henry was a predominantly black, wasn't it?

A No, Henry was predominantly white.

Q It was K, 1, 2, 3, 4?

A Right.

Q Now Page, though, and Dunbar were closed?

A That's correct.

Q And then Star-Spencer has been closed?

A No, sir.

Q Dunjee has been closed?

A Dunjee High School was closed by order of the Court under the Finger Plan.

Q By permission of the Court suspended from operation. Do you recall that Dr. Finger specifically stated that he was proposing that the school be suspended from operation for the time being?

[p. 99] A Okay. Dunjee was suspended from operation.

Q Now Woodson, was that a former black school?

A Page-Woodson is still operating. Woodson is operating currently as a Fifth Year Center.

Q Well, according to an article by Mr. Jim Kolecky of former elementary school buildings to be sold by the School Board include, paragraph 3, Woodson.

A That's the old Carter P. Woodson, Southwest 12th and Harvey, that has not been utilized for school purposes for probably fifteen to twenty years.

Q Okay. Now with regard to those school closings, you did not seek, as your President testified, to get the Court's approval before putting them up for sale, did you?

A Sir?

Q You did not seek to get Court approval, as an administrator, for the sale of these buildings before you offered them for sale, did you?

A The facilities that we have now that are no longer utilized for school purposes; are those the ones you are referring to, the twenty-two schools?

Q Is it twenty-two?

A Twenty-two schools and sites. Most of them are vacant sites that the School District has owned for a number of years. They are no longer needed in the opinion of the Administration, and many of the others that had buildings on them have not been [p. 100] utilized for school purposes for ten, fifteen or twenty years.

Q Have you explored the possibilities and alternatives of utilizing some of that space that you have for the construction of a unitary school system that does not maximize busing?

A Mr. Walker, those facilities would be far inadequate to be utilized for school attendance purposes.

Q How about the 19.7 acre place at 4101 South 27th Place?

A That is a site adjoining Pierce Elementary School, I believe. We do have an elementary school on that site now and that's an adjoining acreage.

Q 19.7 acres is large enough for an educational park?

A At one time that was being considered as a junior high school site.

Q My point though is this, if you have 19.7 acres and you are exploring the possibility of the educational park as an integration device, this would lend itself to

further desegregation and integration of the school system, wouldn't it?

A In my opinion the nineteen acres would not be adequate as far as the size of the site. It would certainly be a beginning point, I assume.

Q Well, you had twenty-one acres at 51st and Foster.

A Yes, that's the former Foster Elementary School site that has been no longer utilized for school purposes for a number of years.

Q You have at least forty acres of land right there that you [p. 101] could use for he devisation [sic] for really an extensive educational park concept, which is agreed upon by you even as an alternative to the present plan, is that correct?

A It is an alternative that could be considered.

Q And you have favorably discussed that on numerous occasions, haven't you?

A I don't know what you mean by favorably discussed.

Q Well, when Dr. Max Wolff was here, when Dr. Eisen was here, and when the other consultants appointed by the Court were here, you did favorably make comments about the educational park device as a method for reducing busing and bringing children closer together.

A I don't know that I said for reducing buses, busing. I said that it could be utilized as a means for bringing

about desegregation and certainly it was deserving of further consideration.

I believe I further stated that if you had no facilities in which to house pupils now but were starting and building new facilities, certainly you could consider that more seriously as a measure or means.

Q So that you propose to the Court to eliminate one of your options, one of your future options for further desegregation without even getting court approval by the sale of school space and school buildings.

I show you this article which appears in the "Daily Oklahoman" [p. 102] 11/14/75, and ask you – it is entitled "Old Schools Go On Block". It is by Jim Kolecky. Are you familiar with this article?

A Yes, sir, I have read it.

Q Are the contents of that article basically correct?

A I don't know as I read it that carefully but I would assume that, knowing Mr. Kolecky as I do, that he would be basically correct.

MR. WALKER: I should like to have introduced as Plaintiff's Exhibit 2.

Q (By Mr. Walker) Is there any particular reason you didn't tell prospective bidders or purchases of that land, or space, that the sales were conditioned upon court approval?

A No, sir. We have as a part of the bid form, however, that any prospective bid is subject to either acceptance or rejection by the Board of Education. These are

again exploratory in a sense to see if there are those customers or potential customers that might have an interest in the property.

Q Going to another subject, with regard to the staffing of the innovative high school, is it true or not that your initial staff persons, including the principal or the director, the assistant principal or the assistant director, were white?

A We do have an assistant director. We have just a director and then the facilitators, which are teachers. They are referred to as learning facilitators.

[p. 103] Q The first ones you hired were all white, isn't that true?

A The first ones, yes, sir.

Q Now Doctor, did you develop any objective recruitment standards before you sought this person to, before you sought the person now, to fill this position in the school system?

A Job descriptions were written, with the criteria of the type person that we were looking for in the selection of a director. They were posted in every building, as well as in the Central Office building. The placement bureaus at the neighboring colleges and universities were also advised that we were looking for such a person.

Q For the directorship?

A Yes, and for each facilitator.

Q Did you have any applicants from the black community, any black applicants for the directorship?

A I believe there probably were. I am not certain on that, Mr. Walker.

Q Do you keep a record of your applications by race for those types of positions?

A Those are kept, yes, sir. We would have those on file.

Q Now did you have an adequate pool of white applicants from which to make a selection?

A I would say we had an adequate number of applications, both black and white, male and female.

Q When you wrote the job description, did you have anybody [p. 104] in mind for this job?

A No, sir.

Q Who did you pick for that job?

A Mr. Robert Alyea.

Q Mr. Robert Alyea?

A That's correct.

Q What was he formerly doing within the school system?

A He had been a teacher and then his most recent assignment had been as a research associate in the Research Department.

Q Did he have any previous administrative experience?

A Not in the administrative sense.

Q Did you write the job description so as to deny or at least not make important previous administrative experience?

A It was not as a requirement or prerequisite that he have that.

Q Did you personally know this man; in other words, is he a friend of yours?

A No, sir. Well, all the staff members are friends, but not a personal acquaintance, not a personal friend, as far as social contact.

Q Have you submitted to the Board any objective criteria for the consideration of personnel for this school or any other school within the system?

A Have I what? I'm sorry.

Q Have you developed and presented to the Board for their [p. 105] consideration or approval objective criteria for the hiring, the promotion, termination, demotion, or bestowing of special benefits upon staff?

A All staff vacancies are, the information is supplied to the members of the Board, with most of those of an administrative nature having the criteria or qualifications desired to fill that position. In addition, in the reorganization of the administrative staff, the change that has been made in the responsibilities of the Personnel Services Department, one of their major responsibilities will be the development of an affirmative action plan and they will assume the responsibility totally for recruitment, selection, employment and training of all employees.

They are in the process of coordinating the development of job descriptions for every administrative position in our school system.

Q So that you don't have objective criteria now?

A For all positions, no, sir.

Q Now are you aware that this is one of the early requirements, early requirements of the Court's decision in this case, that you develop and implement objective, a system of objective Court approved criteria for the placement of personnel and new personnel?

A Mr. Walker, I am not sure that I could say yes in answer to your question. I am not sure of being that specific. I am [p. 106] not sure how complete you are saying the job description should be.

Q But you have determined that there is a need for an affirmative action plan, isn't that correct?

A Yes.

Q Does that not suggest to you that there is a need for continuation of jurisdiction?

A No, sir. The affirmative action plan is a commitment on our part, as well as the requirement of EEO, as well as the Title 9.

Q Have you discussed the EEO requirements with the School Board?

A I would say the School Board is well aware of the requirements.

Q That's not the question. Have you discussed the EEO requirements of Title 7 as it pertains to the development of an effective affirmative action plan with your School Board in a public meeting?

A Not in a public meeting, no, sir.

Q Well, where have you discussed it with them, Doctor?

A In the conferences and written correspondence or communication with members of the Board.

Q When do you think that you will have this affirmative action plan which will govern the employment of teachers and other staff?

[p. 107] A The time table that has been given to the Personnel Services Department is to have it developed and ready for full implementation no later than the second semester which will begin January 19, 1976.

Q Did you intend to have the Court approve the affirmative action plan before you implemented it?

A I am not sure that we have any plans along that line.

Q You do recognize that it has desegregation overtones, don't you; it is a desegregation plan, isn't it?

A I am aware that its major provision is that no discrimination can be allotted or registered or held against any race, sex, national origin, other factors.

Q Now can you commit to the Court that whatever plan you come up with will insure black people the opportunity to hold specialty positions, counselor jobs,

band director jobs, coaching jobs, other kinds of jobs in numbers reasonably proportionate to the black student proportion within the schools?

A I am certain that the affirmative action plan will make provisions for those.

I should also indicate that we now have black band directors. We have black football coaches in our system at the present time.

Q Can you state to the Court now that roughly one-fourth of your head football coaches, head basketball coaches, head track coaches are black, that roughly one-fourth of your band direc- [p. 108] tors, choral directors, counselors at the secondary level are black?

A I could stand corrected but I believe I can make that statement and it would be correct, Mr. Walker.

Q You think you can; head coaches, the head positions. Can you state that one-fourth of the principals at the high school level are black?

A Just slightly less than one-fourth. We have nine high schools in operation with two of those being black.

Q Now it is true that in the last eight years, nine years, you have not hired a single black principal. You have kept the two you had, but you have had some principal turnover, and each time you have had a principal turnover you have replaced that person with a white person, isn't that correct?

A I believe Mr. Robinson, principal at John Marshall, has been employed within that period of time.

Q He was at Douglass or at Northeast?

A No, sir, he was in Kansas City.

Q But he came to Douglass or Northeast, didn't he?

A He came to Northeast as principal there.

Q Which was a black school and would be typed as such until Judge Bohanon disestablished it, isn't that correct?

A Yes –

Q (Interposing) The point though is that you were assigning blacks, or at least until Judge Bohanon changed that pattern, [p. 109] you were assigning black principals at the high school level only to historically black schools and that youall have never hired a black initially who had not been otherwise placed in the system to a white school at the secondary level?

A We have this year. I assigned a black principal to Jackson Middle School, secondary school.

Q Where was he before?

A He was assistant principal in one of the high schools.

Q But that's the operation, though. Is that what you told the Court you would be doing when you are talking about modifying the Finger Plan, you said if you would have a black principal in a school you would have white vice principals, and if you had a white principal at the high school, you would have at least one black vice principal, with the notion being that the next vacancy

that would occur below the high school level would go to one of the assistant principals.

That's your system though, isn't it?

A I am not sure that it is that specific and spelled out, but the fact was that we employed and assigned the black to the Jackson Middle School, which is located in a predominantly white community.

Q How many black principals of junior high schools are there and how many white principals are there?

A We don't have any junior high schools. There are middle schools and high schools.

[p. 110] Q All right.

A We have two white school principals that are black.

Q Uh-huh.

A I believe we have two middle schools. Just a moment and I'll – I believe Harding and Jackson are the two middle schools.

Q How many middle schools are there now?

A There are eleven.

Q All right, two out of eleven. Do you have some pattern of two now, there would be two black principals at the secondary level and two at the middle school level, and perhaps two coaches and two band directors?

A No, sir, we don't have that. It's coincidental that there happen to be two in each place.

Q Now one of the issues that we are not prepared to deal with, of course, in specifics at this time at this hearing are blacks in specialty positions, but you do have those statistics and they would be available if necessary, is that correct, blacks in specialty positions, and whites of course in specialty positions?

A We do have that data available, yes sir.

Q Now have you established a promotion system and got court approval for that so that blacks who come and start off working as teachers can move on up in the same manner that whites do.

A Mr. Walker, that is a part of the affirmative action pro- [p. 111] gram and a part of the challenge or charge given to the Personnel Services Department.

Q Okay.

A And that is the information related to promotional practices.

Q Let me ask you, when did you get your Doctor's degree?

A 1966.

Q When did Dr. Todd get his?

A I'm sorry. I don't know that. About 1970, 1971, something like that.

Q Did Dr. Todd ever perform any responsibilities in the school system on an equal level with you before you became superintendent, or superior to you, I mean in terms of pay or responsibility?

A I believe not, Mr. Walker. He was Director of Curriculum at the time I was Assistant Superintendent.

Q All right. Now I understand he was in competition with you for the superintendency.

A He was one of the four final –

Q Do you know of any school system in Oklahoma which has a majority white enrollment which has a black superintendent?

A I am not familiar with those in the larger rural schools, but I am not aware of any.

Q Do you know what the objective standards if any were which the Board predetermined before narrowing the number of appli- [p. 112] cants to four and then finally deciding upon you for the superintendent's job?

A I think that would be a more appropriate question to ask of those members of the Board.

Q All right.

A They did develop the criteria or the desired qualities and did conduct interviews and did have the, I am sure, objectives in mind.

Q Going to another thing. You testified that you had twenty-nine standardized tests. Is this any different now than it was in 1969 and 1970?

A We have had a Testing Committee that has evaluated the testing program within the last two or three years, and there have been some changes made in those. I am not sure of the specific tests that were altered or

changed, but we did have a Test Committee established to review those.

Q Have those tests ever been validated within the population of Oklahoma City?

A Mr. Walker, I am not sure I can answer that. They are validated by the manufacturers of the exams and then unless we had the specific tests available to determine what the validation process was, I wouldn't know how to respond.

Q Now you have heard the Board chairman say that in his judgment the educational, the educational, the quality of education delivered to black students is less or has been less [p. 113] than the quality delivered by the District to white students.

Do you concur in that judgment?

A I would say that there has been no deliberate attempt to provide a less quality for one group than there has been for another.

Q How does it happen?

A There is more than just the provisions for what the school system provides, Mr. Walker. There are such things as parental interest, the parental push or drive, their desires, as far as educational program.

The school system can provide one aspect of the program, and that's the staff, the services, the facilities, try to develop the interest and motivation to learn, but certainly the attitude and the interest of the part of the parents is important.

Q So you don't agree with the chairman on this point?

A I am not saying that I agree or disagree. I am just saying that there are more factors that are involved in this and there was no deliberate attempt to offer a quality to one group that is different from that of another.

Q Now there is now though a deliberate effort on the part of you, as administrator, to offer or at least to narrow, offer a program which narrows the gap in achievement between black and white students?

A During the past two or three years our school system has [p. 114] gone through an extensive accountability program to make as assessment of needs by individuals schools within the School District, and based on those determined needs, then the program was established to satisfy those needs for those pupils in that particular school. There is a deliberate effort there to determine what the needs are and to establish the program that meets those needs.

Q Now Doctor, you do know that you have courses offered, you have teachers hired, that you have in effect committed to your students that you are going to, for the next year – that is the time you are offering courses – that you are going to have this basic structure within the school; you know that, don't you?

A Our enrollment is processed during the spring of the year preceding the opening of school the following the year, the staffing based on the projected enrollment with the courses then in the high school that have been elective on the part of the pupils.

Q So that basically the students don't have very much input in determining what courses are offered in the school, do they; that's an administrative judgment on the part –

A No, sir, they do have a determination in the high school. We have a list of proposed courses for high schools, some two hundred courses, and the student then selects those courses that he desires.

[p. 115] Q Do you have any standard to determine how many or how few students you will have to have before you can offer a course?

A Depending upon the type program; regular programs, normally fifteen or sixteen, and the class will be materialized if the teachers can be employed.

Q Well, let's not deal with the regular program. You recognize, don't you, that if you have a course for one student in a high school for one hour, that the cost of that alone is much greater than the cost for one class with twenty students?

A Mr. Walker, I am not aware of any program where we have only one student, one teacher. I think if you will review the material there you will find that those classes, they are combination classes. In many classes you will have Trig 1 and 2 or you will have Geometry 1 and 2, or you will have Latin 2, 3 and 4 with the same teacher, with several students in that class. The one student in Latin 4 will be receiving personalized or individualized attention on behalf of that teacher that will also have students with the other courses or with the other foreign language class in that.

Q All right, Doctor. A teacher normally teaches either five or six courses a day, doesn't she?

A In the high school, five classes a day normally.

Q Now are you suggesting that if you have that situation or if it's set forth in your computer printout, that the computer printout is in error?

[p. 116] A I didn't understand the question.

Q Are you suggesting that if you have that situation that the computer printout is in error?

A I am suggesting that if there is a class of Latin 3 and Latin 4 with a very limited number of students in one or the other, that it is more than likely a case where that teacher during that class period has both classes, has responsibility for both classes.

Q Let me understand you. How many courses does a teacher teach in high school?

A Depending on their schedule they may have four solids and then the activities or some other program. It's difficult for me to tell just looking at the name of a teacher how many they might have, but they cannot be asked to teach more than five classes for a day by North Central standards.

Q Look at your Marshall exhibit. It seems that all of the teachers have at least five courses except the band teachers, those kinds of people, choir or P.E.

Look at your German, or Spanish and German teacher, Angelica Hale.

A What page are you on?

Q That's on page 7, Marshall. She teaches one class, she teaches three classes where there are no blacks. She's got two Spanish 1's and in one she has got three blacks and in the other she's got twelve. That twelve happens to be with [p. 117] twenty whites.

I will ask you the same question as before, why don't you disperse that twelve so that you will have some better balance within those two Spanish 1 classes?

A I imagine there are problems and conflicts of other selections or elections that that student has made, by the other courses that they have selected, I may not be able to schedule their course in such a way that they can have a schedule that would permit them to change to that other section.

Q Have you asked your computer programmer who determines programs and schedules for students to try to minimize the racial disparity problem?

A On the scheduling the race is not a factor that we schedule the classes on.

Q Does it now occur to you that a computer programmer can be programed themselves to consider race for purposes of making sure that you do not have equal balances?

A It could, I am sure, and that would be another factor that would cause additional possible conflicts within the schedule that would have to be written in and the program then developed to allow for that.

Q But any group of schedules that you have are going to have some conflicts, aren't they?

A That's correct.

Q So this would just be one other way of reducing the degree [p. 118] of racial identification of a class, wouldn't it?

A But I would also state that by the computer handling the scheduling, I think it does eliminate any possibility that there is any deliberate attempt to schedule based on race.

Q Do you give your basketball and football coaches fewer classes than you do the rest of the teachers?

A It depends if they are a team coach, if they are an assistant coach what their particular assignment might be.

Q Do your regular courses carry more grade point credits than the elective courses?

A No, sir, they are all one credit course per semester.

Q I understand, but do they get more grade points for an "A" in an elective, academic elective, than they do in a regular course?

A No, sir.

Q Are you aware of any racial imbalances in your Honors Program?

A We have not had the Honors Program as such unless you are referring to the Seminar Program and things of this nature.

Q Yes.

A And again those are elective by the students and they participate in that because that's what they have elected.

Q What role does the counselor have, Doctor, in the process?

A They can advise and counsel, and indicate to the students what their suggested programs are for their determined career [p. 119] or their location, if they want to go to college prep, or if they want to go to a terminal program, or just an entry level program or some other program. They can suggest and advise and recommend and make aware. The student then and his parents make the determination of their assignments except those that are required.

Q Have you noticed whether or not blacks are moving more or less into academic courses as integration goes on?

A Mr. Walker, I am not sure that I can tell you that I have noticed either blacks or whites going into those. We do know that we have had a decrease in the enrollment in the Advanced Math and in the Advanced Science programs both. In an attempt to turn it around in Science we have made some changes in our Science programs to try to increase those, but we have witnessed the same kind of experience as has been nation wide in a declining enrollment of Advanced Math and Science programs.

Q But you have not set forth a goal of trying to make sure that as many blacks percentagewise move into academic courses as whites, or in the numbers of the

population, and that as many whites move into vocational courses as blacks percentagewise. Blacks go into vocational courses more so than whites in your system?

A I don't believe the statistical data will hold that to be the case. I think you will still find that there is not a disproportionate number in the vocational classes at the Vo-Tech [p. 120] school and others. I would say also that our primary goal is working with the individual students and not in groups of students by races. We would much prefer taking the student with his interest, with what his goals and aspirations are, and then develop the program in light of that.

Q When do you think you will have sufficient data to be able to determine the efficiency, in terms of results, of what you are doing; when will you be able to say to the Court that we are now dealing with our black students to the same extent that we are dealing with white students?

A Mr. Walker, I believe we can make that statement today.

Q Can you do it in terms of results, in terms of who is in special education at all grade levels, remedial education, remedial reading or what-have-you, and in terms of who is in your college preparatory courses?

A Again I would say we base those assignments of those students on the program that is most adequate to meet their needs, and if it's a black student or a white student that needs special training or special attention, we will place them in that class. If it's and academic

course and they elect to do it whether black or white, they will be placed in that class.

Q You did mention that you use your transfer provision occasionally to place blacks, or to remove blacks from some situations for racial reasons to bring about a better racial balance within some other situations, is that correct?

[p. 121] A Yes, it was indicated that utilization of that has been diminished.

Q I'm not talking about majority to minority now. I am just talking about your assignment devices.

Now do you ever use the same devices to place white students into normally black schools?

A Yes, they have worked both ways, right. We did indicate the provision is to improve the ratio at both places.

Q Have you done so within the last year at any of the schools that you propose to close next year?

A We have not proposed the closing of any schools next year, Mr. Walker.

Q You have not proposed the closing of any?

A We have not made any proposal for the closing of any schools for the next year at this time.

Q One final question. In the event that the Court does divest itself of jurisdiction, do you expect the Court also to eliminate the Biracial Committee and the function of the Biracial Committee?

A In our motion to dispose of the case, we did propose the establishment of a Triracial Committee that would be utilizing much the same function, the same procedure that the Biracial Committee is currently utilizing.

Q What would be their function be?

A Primarily to review, to monitor, to receive, to consult, [p. 122] to advise.

Q What good would that do if you are not talking the recommendations and advice of the present Biracial Committee which has at least some support from the Court?

A I believe, Mr. Walker, we have taken the recommendations and advice. We have not followed all of them but we have taken their recommendations very seriously and considered them and as a result of the recommendations I think you will find there have been some changes in it.

Q But you have rejected a good number of their recommendations, too, have you not?

A We have not concurred with them I think this would be in the same category of any advisory committee. They are to offer advice, and you weigh their advice along with your known factors.

Q So at that point the efficiency of the committee would be subject to the degree of at least the role that you would assign it?

A I'm sorry, I didn't get that.

Q In other words, if you decided that you would listen to the recommendations as the Superintendent or as a Board, you would place whatever weight you wanted to on their recommendations without any consideration as to, you know, the kind of factors that are now present in the Biracial Committee?

A Mr. Walker, I would say that any board or administrative [p. 123] organized or established body, their recommendations or advice is going to be considered with a great deal of interest and it will have a great deal of weight.

Q One question about the moving of the principals. Did you recommend to the Board that those black principals be moved to the formerly white schools, the two principals from Douglass and Northeast, did you recommend to your Board that they be, pursuant to the Biracial Committee assignments, transferred to the schools which the Biracial Committee recommended?

A I was not Superintendent at that time, Mr. Walker.

Q Did you concur in the Biracial Committee recommendations?

A On reassigning those?

Q Yes, sir.

A I would not agree to concur that the race of a principal necessarily determines the race or the racial identity of a school. I think that if we follow that concept that every racial school is racially identifiable, because they are one race or the other. I would say that I would disagree with the concept that the race of the principal determines the racial identity of the school.

Q Was that your understanding of what the Biracial Committee was saying and what Judge Bohanon was saying?

A I believe that it was stated that those two principals, particularly in the former predominantly black schools, the fact that they were black in a formerly predominantly white [p. 124] community, that those would be considered to be racially identifiable schools.

Q Especially with those two schools having the highest percentage of concentration of black students, you did not agree with that?

A I said that I did not agree with the concept that the race of a principal determines the racial identity of the school.

Q That wasn't my point. My question is, do you concur with the rationale submitted by the Biracial Committee and the Court for those two transfers?

A I would restate that I did not agree that the fact that those two principals were black made those racially identifiable schools.

I would further state that the school system did comply and did reassign those principals, even prior to the time or during the period of time in which the appeal was being lodged.

Q If you had been superintendent at that time and the Court had divested itself of jurisdiction at that time, would you have implemented the Biracial Committee recommendation?

A Mr. Walker, I would say that the assignment of those two gentlemen to other schools and the assignment of whites to those previous schools has been very successful and I would say that it has worked out quite well. Trying to speculate on what my decision would have been back then I think would be merely [p. 125] speculation.

Q You did not concur. You did participate in the administrative policy decision to oppose that, didn't you?

A No, sir, I would say that I did not participate in that.

Q You did not discuss that with Dr. Lillard in your role as Assistant Superintendent?

A I would say that in terms of discussing it, to be knowledgeable about it and all, the fact that it was discussed but I was not involved in the decision making process.

Q Did you give a recommendation, sir?

A I did not. At this time this was not my role, The assignment of principals was in the instruction area.

Q What is your judgment of the administrative staff's present relationship with the Court-approved Biracial Committee?

A I would say that the working relationship is very good. I would say that the relationship with our liaison members to that Committee has been good over the past two or three years specifically. I would say that the relationship between the administrative staff and the Board of Education and the Committee is good.

Q How many meetings has the whole Board had with the Biracial Committee in the past twelve months?

A When you say the whole Board, I am not sure that I know that. I was not present at some of those meetings, but I am aware of at least three in the last year where at least members [p. 126] of the Committee and the Biracial Committee were present.

I also know that members of the Biracial Committee have dual, as members of our administrative staff.

Q Has the Biracial Committee been an improvement, or at least been an assistance to the School District in implementing the desegregation plan and helping to eliminate those vestiges of segregation or discrimination?

A I would say that they have served their role well. Particularly the last couple of years they have made their recommendations to the Court and to the Board and to the administrative staff.

Again each of those have been weighed carefully and I think some changes have come about as a result of that.

Q Does the Biracial Committee as presently constituted still have a function to fulfill?

A It has been functioning and it is still functioning, yes.

Q I am asking now, is there a role for it now? Does it still have any viable function now to fulfill?

A Mr. Walker, I would say based on our motion that was submitted and the fact that we indicated that we are desirous of continuing the Committee and we have

expanded, instead of Biracial, to Triracial, it's an indication of our agreement with or approval of this type of committee.

Q So that there is still a function for –

[p. 127] A For a committee.

Q And this is acknowledgement that there are still vestiges of discrimination or segregation within the school system?

A I would say there are not vestiges. In my opinion we are a unitary school system. We have no discriminatory practices.

MR. WALKER: We are back where we started in 1969. Thank you.

THE COURT: Any further questions of Dr. Smith?

MR. JOHNSON: Two questions, your Honor.

REDIRECT EXAMINATION

By Mr. Johnson:

Q Dr. Smith, did I understand you to say that the middle school at Central was moved to Moon-Kennedy?

A That is correct. The building that is now the Moon Middle School was the Kennedy Junior High at one time. Then it was the Ninth Grade Center for Douglass High School, with the Douglass plant having only the tenth, eleventh and twelfth grades.

Q Was that the first and is it the only middle school in what is called the black community?

A Yes, I would say in the major part of the school district that is correct.

Q The Finger Plan did not call for a middle school in that general vicinity?

A That's correct.

Q One more question. On the transferring of students from [p. 128] Dunbar to Edwards, I ask you whether that was due to the low enrollment?

A It was to help to boost the enrollment of whites at Edwards and then also help on the transportation as well, aso [sic] it was really a dual purpose there.

MR. JOHNSON: That's all.

THE COURT: Any further questions of Dr. Smith?

MR. WALKER: None, your Honor.

THE COURT: Dr. Smith, the Court will ask you one question. Can you tell the Court how the Court's jurisdiction has a detrimental effect on your school system other than the required desegregation of the constitution?

THE WITNESS: Your Honor, I think it is probably psychological and public relations reasons. One of our major goals is to improve the positive image of our patrons toward our school system. I believe the image that exists now and the court involvement, or the overseeing of the court, does make that goal more difficult to accomplish, to reach that positive image.

THE COURT: Well, what you are really saying is that this is what you might call a fallout of the desegregation requirement of the constitution; is that what you say?

THE WITNESS: I believe I would agree with you.

THE COURT: Any further questions? You may step down, Dr. Smith. Call your next witness.

(Witness withdraws)

[p. 129] MR. JOHNSON: Defendant rests.

THE COURT: Let the record show the School Board now rests its motion.

Does the defendant have any evidence to offer?

MR. WALKER: Plaintiff is ready, your Honor.

THE COURT: Plaintiff, excuse me. Call your witness.

SHIRLEY DARRELL,

called as a witness on behalf of the plaintiff, being of lawful age and having first been duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Jones:

Q Would you state your name for the record, please?

A Shirley A. Darrell.

Q Mrs. Darrell, how long have you been a resident of this community?

A All my life.

Q Did you attend public schools here?

A I did.

Q Do you presently have a child in the school system?

A Yes, I do.

Q Are you employed at this point?

A Yes. I am Director of McFarland Branch, YWCA.

Q And do you serve on the Biracial Committee?

A Yes, I do.

Q What position do you hold on that committee?

[p. 130] A I am presently the Chairperson of the Committee.

Q How long have you served on the Committee and how long have you been Chairperson?

A I served on the Committee approximately a year and a half. I have been the Chairperson since August of this year.

Q As a parent of a black child in this school system and as a member and Chairperson of the Biracial Committee, do you have any view about whether or not the Oklahoma City School District as now constituted has reached a point of total desegregation at all levels and in all activities?

A I have to sincerely say that I think they are moving toward it. My personal opinion at this point is that at this point in time I would not be able to answer that affirmatively, but I do feel that they are making very definite progress in that direction.

Q But you cannot say at this time that they have fulfilled that requirement?

A That's correct.

Q Before we get into the specifics of your belief, can you tell us something about your views on the Biracial Committee's relationship with the administrative staff and the School Board over the past year or so?

A Well, the Biracial Committee has, since I have been on the Committee, always enjoyed a very good relationship and good rapport as far as with the School Administration and the [p. 131] officials. We have had no real problems in dialoging or communicating with them or obtaining information; and I think that basically the Committee, in its report to the Court recently, would reflect at this point in time that the Committee, although they feel that there has been great progress, that there is so much newness at this point that we still have great concerns that say all vestiges of segregation have been removed.

Q Let's talk about some of those specific concerns. Would you care to discuss the Innovative School for a moment?

A I'm sorry. I didn't hear you.

Q Would you care to discuss the Innovative School and its effect on black students within the system?

A Well, specifically we were concerned about the fact, speaking basically of trying to carry the Committee's sentiments, on the report that we have it does indicate that there is a principal and an assistant at that school. Those are the statistics that are in our report, and yet we get different information, that there is no assistant or what-have-you.

One thing that does bother us from time to time is that sometimes it's a pure question of credibility of the information which we obtain. The Innovative School is one of those situations. We have gotten a lot of different replies to the same questions, which bothers us.

For example, on how the students are going to be selected, [p. 132] how the staff is going to be selected, and that type of thing.

I personally am concerned about the number of students that the Innovative School is supposed to accommodate. I am concerned about the fact that that is a very large facility for only two hundred youngsters. In my own mind, for example, I could see that two hundred youngsters could function much more appropriately and effectively at a facility such as Dunbar, a much smaller facility. I would think that it wouldn't cost as much to operate. So I have lots of concerns about the Innovative School being practical as well as economic.

Q Although you have previously indicated that at least the relationship between the Committee and the Board and staff has been amicable, you also mentioned that there is a credibility problem. Will you tell us a little bit more about that?

A Well, like I say, it's mainly whether or not the information we get at one point in time is in fact accurate, because as I indicate, there are several instances when we get conflicting information and it makes it difficult to really know which set of data to utilize and when you know to decide that, what is said is correct.

Q In your opinion, does that bear on the good faith of the present School Board?

A Well, I don't know actually, whether – I don't know that it has been a deliberate sort of thing. I don't want to say that it is deliberate, but I say that there is, there is a gap [p. 133] there, a void. I don't want to say that they are deliberately feeding us misinformation but I think it results from the fact that many times they do something at one time and then perhaps they realize they should have done that differently so then they do it differently and they change the information on it.

Q Are you familiar with the '74-'75 suspension and disciline [sic] statistics that have been previously introduced here?

A Yes.

Q Did the Biracial Committee receive those?

A Yes, we did.

Q Can you tell us that the reaction of the members of the Biracial Committee was to those statistics?

A The reaction was alarming. We were very disturbed, and we were disturbed for many reasons and I,

you know, basically because the numbers was so disproportionate; so then, you know, we were, you could say at one point almost frustrated.

For example, we certainly could not conclude that these incidents were racial because the kids had to be fighting each other, you know, all the black kids had to be fighting black kids, because these were the only kids being thrown out or whatever the incidents were, because as you see, the numbers were so far off, like six blacks and no whites.

So at least we were happy that the situations were not racial, because there was only one race involved that we were very disturbed about, from that point on about why.

[p. 134] Q Is that an area in which you think the Biracial Committee can have input in dealing with that problem?

A Well, how do you mean? I'm not sure I am following you.

Q Do you think that is a source of continued dialog between the Biracial Committee and the Board and staff, and that your input is important in dealing with the problem of the disparity of suspensions of black students?

A Well, yes, I would think so, and I would think that probably it would be advantageous, you know, further on down the line or in subordinate echelons because it was interesting to the Committee to discover last year that the lower echelons of the Administration are not afforded the advantages of our report.

For example, we had a meeting with some principals last year and they indicated they had never seen a Biracial report, so they had no idea as to what any of the recommendations were.

Several of the recommendations they were favorable to and they indicate that, you know, that they could have been helpful to them but that they were not afforded the information; so I would say yes, you know, that on down the line if the information were filtered down it could be helpful.

Q Now under the new suspension policy I think Mr. English indicated that handbooks were distributed during the '74-'75 school year. Was that the understanding of the Biracial Committee?

[p. 135] A Well, to answer your question, we never did really get an understanding. We got there again several different replies. We were given to understand at one point that the handbooks were being stapled, for example. Then at another point we were given to understand that they had been distributed. Then at another point we were given to understand that they were being redone, so on our last inquiry we asked to be informed as to how specifically the handbooks were in fact distributed, were they, for example, distributed at PTA, do the kids have to sign for them, so that the Biracial Committee was never in a position to either concur or disagree that the handbooks were ever distributed.

Q Do you have any opinion, do you have anything which indicates that perhaps the Biracial Committee

could be helpful in dealing with the problems of extracurricular participation of black students; is that an area the Biracial Committee can be helpful in?

A Well, I don't know that the Biracial Committee, if I am following your question, could be helpful. I think that are a lot of things that we could suggest or, you know, different things, but I really think that that –

Q Is that an area of concern?

A That's a definite area of concern, yes, and it concerns us because here again the numbers are too disproportionate. We are just not convinced that all the girls are not interested [p. 136] in cheerleading. We are not really convinced that extracurricular activities are passe for black kids, when heretofore they have been as near and dear to them as any other child, you know, during its adolescent years, so we are concerned about that.

Q Do you view those results as a vestige of discrimination and desegregation?

A Yes, I guess I would have to say that I do.

Q Are there any other areas in which the Biracial Committee has particular concern about the functioning of the school system and whether or not it is meeting the constitutional standard at the present time?

A We have a lot of concerns about the fact that the Administration, although it changes, it does not really – I am at a loss exactly how to say this – although it changes and people change positions and people change slots, it's more or less like a maze, you know, they just go around, but then there is really no change, for example, in the upper echelon.

Now we were very concerned about the fact that there was only one black on the upper echelon, then the fact that in the reorganization now there are three. There really aren't any more people. They are the same three blacks that were there all the time. It's just they lumped them all together in one echelon category.

It's these kinds of things that bother us.

[p. 137] Q Are you saying, Mrs. Darrell, you would like to believe that the School Board and staff are acting in good faith, but that the factors you have talked about and the actions of the School Board cannot lead you to come to that conclusion at the present time?

A That is absolutely correct. I really hate to say it is, but that is my opinion at this point.

MR. FRENCH: We have no questions, your Honor.

THE COURT: All right, you may step down, Mrs. Darrell.

(Witness withdraws)

THE COURT: All [sic] your next witness.

MR. WALKER: That's our witness, your Honor. We rest on that point.

THE COURT: All right. Does counsel on either side have any argument to make or suggestion to make? What do you have to say, Mr. Johnson, if anything?

MR. JOHNSON: I would waive any argument if Mr. Walker wants to.

MR. WALKER: I don't think any argument is appropriate, your Honor. I think that facts are rather clear.

I would like to submit our Memorandum and our Statement and Affidavit to the Court at this time for the Court's consideration.

THE COURT: What is this? Your statement of what?

[p. 138] MR. WALKER: Have to talk a little bit louder.

I should like to submit at this time to the Court our Memorandum in support of our Motion for Counsel Fees and supporting affidavit.

THE COURT: For attorney fees?

MR. WALKER: Yes, sir.

THE COURT: Have you received a copy of this, Mr. Johnson?

MR. JOHNSON: I received copies just immediately prior to the hearing. I would like to have time to study what he has.

THE COURT: Of course you should have an opportunity to file a response to it and then the Court should set it down and have a hearing. This is an important matter both for Mr. Walker and for the School Board and for the Court.

This calls for a full blown-up hearing as to all the facts and circumstances about it, and it's a matter that

should be attended to, I think, without any unnecessary delay.

How much time do you care to have to file your response, Mr. Johnson?

MR. JOHNSON: Oh, about fifteen days.

THE COURT: Fifteen days. Then will it be ready to set down here evidence as to what a reasonable fee is, what the fee should be?

MR. JOHNSON: As far as I know we will be.

[p. 139] THE COURT: Will that be agreeable?

MR. WALKER: That will be agreeable, your Honor. We do not need any reply time. If the Court would just set it down as soon after fifteen days as possible.

THE COURT: After you file it why the Court will ask the Clerk, direct the Clerk to set it down.

MR. WALKER: Thank you.

THE COURT: I want to take this opportunity to thank each and every member of the present Biracial Committee and the Biracial Committees in days and weeks and years gone by. To me this Biracial Committee has done a yeoman job. They have helped the Court in many ways and I know they have helped the School Board in many ways.

I can't help but give the Biracial Committee much credit for the movement of the School Board as it now exists and it's now operated, as compared to the way it

was operating, the School Boards were operating before the Biracial Committee came into existence.

The Biracial Committee in my judgment has done much to iron out much of the problems that the Court had and the School Board had with the Court, and I hope it continues at least for awhile.

I also want to take this opportunity to thank the present members of the School Board for their attitude and cooperative attitude, in looking forward to bringing this [p. 140] school desegregation plan into full congressional or constitutional compliance with the law.

This is the only interest that the Court has in this case at all; that is, to bring about a constitutional compliance in the educational system, the School Board in Oklahoma City. The School Board in what they have done and what they are doing and plan to do is certainly encouraging to the Court. It does warm my heart to know that the day is coming when, like the Supreme Court says, there will be no black schools or white schools, but all the schools will be schools without whether it be black or white or anything like that.

Well, if there is nothing further to come before the Court, we will take a recess. Anything further?

Court is in recess.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-9452

ROBERT L. DOWELL, ETC., *et al.*,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE
OKLAHOMA CITY PUBLIC SCHOOLS, ETC., *et al.*,

Defendants.

[Filed Jan. 18, 1977]

ORDER TERMINATING CASE

There is now pending before the Court a Motion by the defendant to close the case. A hearing has been conducted by the Court to receive the evidence of both plaintiff and defendants concerning the state of desegregation in the Oklahoma City Public Schools.

The Court has carefully reviewed this evidence and all of the reports it has received from the defendant and the Biracial Committee since the inception February 1, 1972 of "A New Plan of Unification for the Oklahoma City Public School System," commonly know as the Finger Plan. The Court has concluded that this was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee

that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.

Constitutional principles so bitterly contested by former members of the Board have now become a part of the fabric of the present school administration. The only standard ever imposed by the Court has been obedience to the Constitution. The School Board, as now constituted, has manifested the desire and intent to follow the law. The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimination so corrosive of the human spirit and so plainly forbidden by the Constitution.

ACCORDINGLY, IT IS ORDERED:

1. The Biracial Committee established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

Dated this 18th day of January, 1977.

/s/ Luther Bohanon
United States District Judge

[606 F. Supp. 1548 (W.D. OKL. 1985)]

Robert L. DOWELL, et al. Plaintiffs,

v.

BOARD OF EDUCATION of the OKLAHOMA CITY PUBLIC SCHOOLS, et al. Defendants,

Applicant for Intervention: Yvonne Monet Elliot and Donnoil S. Elliot, both minor children, by and through their parent and guardian, Donald R. Elliot; et al.

NO. CIV-9452.

United States District Court,
W.D. Oklahoma.

April 25, 1985.

John W. Walker, Little Rock, Ark., Ted A. Shaw, New York City and Lewis Barber, Jr., and Jethro Curry, Oklahoma City, for petitioners.

Ronald L. Day, Oklahoma City, for defendant Bd. of Educ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BOHANON, District Judge.

On February 19, 1985, the petitioners filed a Motion to Reopen this desegregation case to challenge the constitutional validity of a recently proposed Student Reassignment Plan which curtails cross-town busing in Oklahoma City of elementary school children in grades one through four. In their motion, petitioners allege that the Oklahoma City School District has not achieved unitary status, and

that the School Board's proposed plan creates racially identifiable neighborhood schools thereby resegregating the Oklahoma City School District.

On March 6, 1985, the defendant School Board filed a Response to Petitioners' Motion alleging the school district became unitary in 1977 and that the proposed plan was justified and constitutional.

On March 13, 1985, the court entered an Order finding that petitioners' Motion and defendants' Response joined the issues, and set the Motion to Reopen down for an evidentiary hearing. The hearing was conducted on April 15 and 16, 1985. At the hearing the petitioners were represented by John W. Walker of Little Rock, Arkansas, Ted A. Shaw of New York City, New York, Lewis Barber, Jr., of Oklahoma City, Oklahoma, and Jethro Curry of Oklahoma City. The defendant Board of Education was represented by Ronald L. Day of Oklahoma City.

Case History

This action was originally commenced in October, 1961, as a class action seeking equitable relief against the Oklahoma City Board of Education for operating a state compelled dual system of education. In July, 1963, this court handed down its decision finding that the Oklahoma City School Board's refusal to grant a transfer to a black student from a predominantly black school to a predominantly white school constituted unlawful race discrimination. *Dowell v. School Board of the Oklahoma City Public Schools,* 219 F.Supp. 427 (1963). During the years that followed, this case again came before this court and appellate courts on issues relating to the Oklahoma City

School Board's obligation to convert a state-compelled dual school system into a unitary system which would eliminate racial discrimination.

In February, 1972, after conducting many hearings, this court ordered the Oklahoma City School Board to implement what come to be known as the "Finger Plan." *Dowell v. Board of Education of the Oklahoma City Public Schools,* 338 F.Supp. 1256 (W.D.Okl.1972). Under the Finger Plan, high school attendance zones (grades 9-12) were restructured so that each high school enrolled both black and white pupils. To accomplish this, an elementary school feeder system was used so that students were assigned to a high school based on the elementary school attendance zone in which their home was located. Similarly, middle schools (grades 6-8) were desegregated by the establishment of attendance zones for each school. At the elementary level all majority black schools were converted to fifth year centers, while all other schools were to serve grades 1-4. White students in the group attended their neighborhood school for grades 1-4, and attended the formerly black schools for the fifth grade. Black students formerly assigned to the schools now used as fifth year centers were split up and attended the majority white schools for grades 1-4. Black students in fifth grade attended the fifth grade center which was previously their neighborhood school. Elementary schools located in naturally integrated neighborhoods qualified for an exception to the general plan known as "stand alone" status, a term to be explained further *infra,* and operated as schools enrolling grades kindergarten through fifth. Kindergartens existed at each elementary school and were permitted to continue without forced desegregation

through busing. Parents of kindergarten children were given the freedom to choose the school their child attended. The freedom of choice was justified because it permitted kindergarten children to go to the school in the vicinity of the place where their mother was working, or to walk to kindergarten with other siblings or neighborhood children. *Id.* at 1267-1268.

The court's decision in February, 1972 implementing the Finger Plan was upheld on appeal. *Dowell v. Board of Education of the Oklahoma City Public Schools*, 465 F.2d 1012 (10th Cir.1972), *cert. denied* 409 U.S. 1041, 93 S.Ct. 526, 34 L.Ed.2d 490 (1972).

The Oklahoma City Board of Education implemented and properly operated the Finger Plan for several years. After the Finger Plan had been in operation for some time, the Board of Education filed a "Motion to Close Case" on the grounds that it "[had] eliminated all vestiges of state-imposed racial discrimination in its school system and [was] . . . operating a unitary school system." Thereafter, the court conducted a hearing to receive evidence from plaintiffs and defendants concerning the state of desegregation in the Oklahoma City public schools, and on January 18, 1977, entered an order relinquishing its jurisdiction and terminating this case. The "Order Terminating Case" states in pertinent part as follows:

> . . . [T]he School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the *unitary system* so slowly and painfully *accomplished* over the 16 years during which the cause has been pending before the Court."
>
> . . . .
>
> Now sensitized to the constitutional implications of its conduct and with a new awareness of is responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. . . .
>
> ACCORDINGLY, IT IS ORDERED:
>
> 1. The *Biracial Committee* established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;
>
> 2. *Jurisdiction* in this case is *terminated* ipso facto subject only to final disposition of any case now pending on appeal. (emphasis added)

Plaintiffs did not appeal the Order Terminating Case. To this date the Oklahoma City Board of Education continues to implement the substance of the Finger Plan with minor modifications. There has been no attempt to revive or reopen this case during the eight years which passed from the time this court terminated its jurisdiction until the present contest.

Findings of Fact

1. One of the many elements of the Finger Plan carried forward by the Oklahoma City Board of Education was the provision for kindergarten through fifth grade (K-5) "stand alone" schools. That is, when racial balance in a neighborhood is achieved through natural integration the elementary school qualifies as a K-5

"stand alone" school. When this status is achieved, the fifth grade is returned to the elementary school, and the children are no longer bused into or out of the elementary school to achieve racial balance.

2. As the years passed by, more and more neighborhoods in Oklahoma City became naturally integrated. By mid-1984, more than twelve years after the Finger Plan had been in operation, more than a dozen elementary schools were located in neighborhoods with a racial balance that qualified them for "stand alone" school status.

3. In 1984 the Board of Education recognized Bodine Elementary School in southeast Oklahoma City as a K-5 "stand alone" school. In the process, the School Board noticed certain inequities (hereinafter identified) starting to surface with the advent of more and more schools qualifying for K-5 "stand alone" status.

4. On July 16, 1984, the Board of Education appointed a committee to study the school district's K-5 schools, and to report back to the Board with positive recommendations. The committee consisted of three School Board members. Dr. Clyde Muse, who is black and has a Ph.D. in education, chaired the committee. Also on the committee were Mrs. Susan Herr.es and Mrs. Betty Hill. Both of these School Board members had prior experience as certified school teachers. The committee frequently called upon the school district's research department for data and statistics needed during the study. During the time the committee was meeting, Dr. Muse traveled to the Office of Civil Rights in Dallas, Texas, for consultation and advice.

5. On November 19, 1984, the committee presented a report to the entire Board concerning its study on the far-reaching effects of an increased number of K-5 "stand alone" schools, and recommended that the Board adopt a new Student Reassignment Plan which, among other things, eliminated K-5 "stand alone" schools.

6. The committee study revealed that as more neighborhoods become naturally integrated and their schools qualify for K-5 "stand alone" status, the young black students previously bused into those schools would have to be reassigned to other schools. Since most of the naturally integrated schools are centrally located in the City, the reassignment of young blacks would be to schools located further north, west or south. The effect would be to increase the busing burden in terms of time and distance on young black children in the first through fourth grades. Further, the committee pointed out that when a "stand alone" school reacquires its fifth grade, this causes the student population at the fifth year centers located in the northeast quadrant of the district to drop, and the centers to be subjected to closing.

7. Also, the committee was concerned with the decline of parental involvement in the schools, and wanted a plan which would have the effect of increasing parental involvement. Curriculum uniformity was also a consideration of the committee. All fifth year centers have enrichment programs including intramurals, string instruments, the Opening Doors program and special interest sessions. The committee felt it would be increasingly difficult to make these fifth year center programs equally available within the new K-5 "stand alone" schools.

8. After the committee made its report and submitted its recommendation, public hearings were conducted at various schools throughout the community to discuss the proposed plan. Thereafter, a special School Board meeting was conducted on December 10, 1984, so that anyone in the community could state their views and make suggestions about the proposed plan directly to the Board of Education. The Superintendent of Schools sent copies of the proposed plan to the Office of Civil Rights, and invited personnel from the Office of Civil Rights to attend the public hearings where the proposed plan was being discussed.

9. As a result of positive input from the public, the committee recommended that certain specific amendments not affecting the overall character of the plan be made. Thereafter, on December 17, 1984, the Oklahoma City Board of Education unanimously adopted the Student Reassignment Plan which is to go into effect at the commencement of the 1985-86 school year.

10. The fundamental elements of the plan, admitted into evidence as plaintiffs' Exhibit #1 and incorporated by reference in these findings of fact, are as follows:

(a) The Plan calls for K-4 neighborhood schools throughout the district. This eliminates compulsory busing of young black children, grades 1-4, to elementary schools outside their immediate neighborhood;

(b) An equity officer is to monitor all schools to insure the equality of facilities, equipment, supplies, books and instructors in all schools. An equity committee is to assist the equity officer and recommend ways to integrate

students at any racially identifiable elementary schools several times each year;

(c) A "majority to minority" transfer policy will allow elementary students assigned to a school where their race is in the majority to obtain a transfer to a school in which their race will be in the minority. The transfer option is encouraged through district-provided transportation;

(d) All faculties and staff will remain integrated at all schools in the district; and

(e) Fifth year centers will be located in all sections of the school district. All fifth year centers, middle schools, and high schools in the school district will continue to be racially balanced with the aid of busing.

11. Population changes have occurred in the Oklahoma City School District from the time the Finger Plan was implemented. In 1970, 325,000 people lived in the school district. In 1980, 305,000 people lived in the school district. In 1971, 68,840 students attended school in the district. In 1985, 40,375 students attend school in the district. In 1971, the student population was 23.4% black. In 1985, the student population is 38.3% black. In 1971, the student population was 76.6% white. In 1985, the student population is 49.6% white. (The failure of the 1985 figures to add up to 100% is due to the exclusion of non-black minorities from the figures used to calculate percentages of whites and blacks. This apparently was not done with the figures presented to the court in 1971.)

12. Presently, the racial composition of the faculty and staff serving Oklahoma City Public Schools is as follows:

Teachers	30.4% black
Principals	28.4% black
Other Administrators	35.5% black
Coaches	45.6% black
Counselors	41.3% black
Special Ed. Teachers	30.2% black
Support Personnel	45.9% black

Also, the Oklahoma City Board of Education has in the past and continues to implement and follow an affirmative action plan. At present, racial balance within 15 percentage points of the proportions in the system-wide student population is maintained in all classes in grades 1-12 through busing.

13. Under the Student Reassignment Plan there will be 64 elementary schools. Eleven of those schools will be ninety percent (90%) or more black. Twenty-two of the 64 elementary schools will be ninety percent (90%) or more white and non-black minorities. The remaining 31 elementary schools will be racially mixed between blacks and non-blacks. The Oklahoma City Board of Education has neither altered the boundaries to these elementary schools so as to create a certain number of racially identifiable schools, nor attempted to fix or alter demographic patterns to affect the racial composition of its schools.

14. Under the Student Reassignment Plan the curriculum in all the elementary schools will be the same. The special education programs offered in all schools will be the same. The student-teacher ratio in all schools remain the same. Facilities, equipment, supplies and textbooks will be equal. As was pointed out previously, the faculties and staffs at each elementary school will remain integrated.

15. In the early 1970's, there were approximately 94 parent-teacher associations within the school district with a total membership in excess of 25,000 people. Presently, there are only 14 parent-teacher associations and the membership is less than 5,000. Parental involvement is an essential ingredient to a quality education. The Board of Education previously took steps in an effort to increase parental involvement. An attempt was made to implement a district-wide parents council. School board meetings were moved out into the community. Buses were sent to certain schools to pick up parents for meetings. However, these efforts failed. The court finds that the degree of parental involvement in the schools is a legitimate concern of the Board of Education, and that the School Board's proposed plan will have the effect of increasing parental involvement at the elementary school level.

16. Student participation in extracurricular activities is also an essential ingredient to a quality education. The School Board's proposed plan will give elementary students a greater opportunity to participate in such activities.

17. The School Board has a genuine concern for maintaining schools in all areas that the school district serves. Also, the amount of time and distance traveled by elementary school children on buses is a genuine concern of the Board of Education.

18. The Board of Education adopted the Student Reassignment Plan for legitimate purposes: to protect against the loss of schools in the northeast quadrant of the district; to maintain fifth year centers throughout the

district; to reduce the busing burden on young black students; to increase parental and community involvement in the schools; and to improve programs and provide elementary children with a greater opportunity for participation in extracurricular activities.

19. The Student Reassignment Plan is not discriminatory, and it was not adopted by the Oklahoma City Board of Education with the intent to discriminate on the basis of race or with a deliberate purpose to affect the racial composition of the schools. Any change in the racial composition of the schools that may be expected to result from the plan is an unintended and largely unavoidable consequence of other objectives sought for the benefit of all student. The court is convinced that the Board of Education is equally concerned about the health, education and well-being of both black students and white student.

20. The School Board members on the committee who recommended the Student Reassignment Plan were qualified by virtue of their educational background and experience to conduct the study and formulate the various components of the Student Reassignment Plan. The Student Reassignment Plan is educationally sound, and when implemented, will accomplish the objectives of the Board of Education.

Conclusions of Law

1. The Supreme Court in *Green v. New Kent County School Board*, 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1693-94, 20 L.Ed.2d 716 (1968), held that once it is determined that a school district is operating a dual system, then the

school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." In *Green*, the Court identified six components of a school system which must be desegregated before the entire system can achieve unitary status: faculty, staff, transportation, extracurricular activities, facilities, and composition of the student body. *Id.* at 435, 88 S.Ct. at 1692.

2. The specific question of when a district court should declare a school system "unitary" and terminate its remedial jurisdiction has been addressed by the Supreme Court and the Tenth Circuit Court of Appeals. The Supreme Court in *Raney v. Board of Education*, 391 U.S. 443, 449, 88 S.Ct. 1697, 1700, 20 L.Ed.2d 727 (1968) held that "in light of the complexities inhering in the disestablishment of state-established segregated school systems, *Brown II* contemplated that the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved." Similarly, in an earlier decision in this very case, the Tenth Circuit Court of Appeals stated that "jurisdiction should be held until such time as the court is satisfied that the decreed unconstitutional practices are eliminated and appellant board is found to be in full compliance with the teachings of the *Brown* case." *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F.2d 158, 168 (10th Cir.1967).

3. This court in its 1972 order directing the implementation of the Finger Plan recognized that the court "was required to retain jurisdiction to evaluate the Plan in practice and to see that state imposed segregation was completely removed." *Dowell v. Board of Education of the*

Oklahoma City Public Schools, 338 F.Supp. 1256, 1258, footnote 1 (W.D.Okl.1972).

4. At the time this court totally relinquished its jurisdiction over this case in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the School District had reached the goal of being a desegregated non-racially operated and unitary school system. In the Order Terminating Case this court specifically found that the School Board had complied with the requisite constitutional requirements and recognized that a "unitary system" had been "accomplished" over the previous sixteen years. The Order Terminating Case was not appealed, and no attempt to revive or reopen this litigation was made during the eight years which passed from the time the Order was entered in 1977 until the Motion to Reopen was filed in 1985.

5. The Supreme Court has approved the view that the fact that a case is in the nature of a suit in equity, authorized by 42 U.S.C. § 1983, as is this one, "presents no categorical bar to the application of res judicata and collateral estoppel concepts." *Allen v. McCurry*, 449 U.S. 90, 97, [101 S.Ct. 411, 416, 66 L.Ed.2d 308] (1980). These concepts were explained by the Court as follows:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell v. County of Sac*, 94 U.S. 351, 352 [24 L.Ed. 195]. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of

> action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153 [99 S.Ct. 970, 973, 59 L.Ed.2d 210]. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.* at 153-154 [99 S.Ct. at 973-974].

Id. at 94, 101 S.Ct. at 414. In the present case, this court's finding in 1977 that a unitary system had been achieved by the Oklahoma City public schools is res judicata as to those who were then parties to this action. At the time of that Order, the plaintiffs in this action represented the entire class of school-aged black children within the Oklahoma City Public School district, and the present petitioners acknowledge that this class included *future* black children. At the very least, the present applicants for intervention, appearing through their parents and guardians, seek to represent a similarly-defined class of black children and are themselves members of said class. Though the individual members of this class may have changed with the passage of time, this change cannot defeat the preclusive effect of this court's original finding of unitariness. Courts have held that even when a first case was a so-called "spurious" class action "a public body should not be required to defend repeatedly against the *same* charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed." *Bronson v. Board of Education*, 525 F.2d 344, 349 (6th Cir.1975) *cert. denied*, 425 U.S. 934, 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976) (emphasis in original). There has been no showing in this case that the

original plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present petitioners are, therefore, collaterally estopped from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977 even in res judicata itself is not strictly applicable to the facts of this attempted class intervention. *Id.; see Bell v. Board of Education,* 683 F.2d 963 (6th Cir.1982); *L.A. Unified School District v. L.A. Branch NAACP,* 714 F.2d 935 (9th Cir.1983) (*Bronson* cited with approval, but res judicata found to be the more applicable doctrine under the circumstances of the case).

6. Furthermore, this court finds that the Oklahoma City School District displays today, as it did in 1977, all indicia of "unitariness." It has now been thirteen years since cross-town busing was introduced and almost twenty-five years since the start of desegregation litigation in Oklahoma City. The evidence in this case demonstrates that the Oklahoma City School District remains unitary today. The School Board, administration, faculty, support staff, and student body are integrated. Further, transportation, extracurricular activities and facilities within the school district are equal and non-discriminatory. This court's finding of unitariness in 1977 was fully justified, and remains a finding which is today fully justified.

7. Supreme Court precedent is clear that once a school system has become unitary, the task of a supervising federal court is concluded. "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination

through official action is eliminated from the system." *Swann v. Charlotte-Mecklanburg* [sic] *Board of Education,* 402 U.S. 1, 31-32, 91 S.Ct. 1267, 1283-1284, 28 L.Ed.2d 554 (1971). Where unitary status has been achieved, district court intervention is normally not necessary unless there is a showing that the school district "has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools." *Id.* at 32, 91 S.Ct. at 1284. "[H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, [a District Court has] fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Pasadena City Bd. of Education v. Spangler,* 427 U.S. 424, 436-37, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976).

8. The Tenth Circuit Court of Appeals has recognized "that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental Constitutional principle or deprive certain classes of individuals of their Constitutional rights." *Board of Education of Oklahoma City Public Schools v. Dowell,* 375 F.2d 158, 166 (10th Cir.1967), *cert. denied,* 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 993 (1967).

9. Also, the Supreme Court has recognized that in a system that has not been deliberately constructed and maintained to enforce racial segregation, "it might well be desirable to assign pupils to schools nearest their homes." *Swann,* 402 U.S. at 28, 91 S.Ct. at 1282.

10. Congress has also passed legislation recognizing the desirability of neighborhood schools. 20 U.S.C. § 1701 states:

> (a) The Congress declares it to be the policy of the United States that –
>
> (1) All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin; and
>
> (2) The neighborhood is the appropriate basis for determining public school assignments.

The fact that the Student Reassignment Plan adopted by the Oklahoma City Board of Education calls for neighborhood schools in grades K-4 does not offend the Constitution.

11. In *Swann*, the Supreme Court noted that, "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. 24, 91 S.Ct. 1280. Furthermore, the existence of some one-race schools within a district "is not in and of itself the mark of a system that still practices segregation by law." *Id.* at 26, 91 S.Ct. at 1281.

12. The existence of racially identifiable schools is not unconstitutional without a showing that such schools were created for the purpose of discriminating on the basis of race. *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). The presence of discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure upon one race. The Supreme Court has clearly stated that "official action will not be held unconstitutionally solely because it

results in a racially disproportionate impact." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 562-63, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The Student Reassignment Plan was not created for the purpose of discriminating on the basis of race.

13. The Supreme Court has recognized the optional majority-to-minority transfer provision as a useful part of a desegregation plan. *Swann*, 402 U.S. at 26-27, 91 S.Ct. at 1281.

14. The Supreme Court has also acknowledged that:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process . . . [L]imits on time of travel will vary with many factors, but probably with none more than the age of the students involved.

Swann, 402 U.S. at 30-31, 91 S.Ct. at 1283.

15. The decision whether a case should be reopened under Federal Rule 60(b)(6) is discretionary. Special circumstances must be shown in order to justify relief under this rule. *Stewart Securities Corp. v. Guaranty Trust Co.*, 71 F.R.D. 32 (W.D.Okl.1976). The Student Reassignment Plan of the Oklahoma City Board of Education is constitutional, and special circumstances are not present which would justify reopening this litigation.

An appropriate order will accordingly be entered herein.

ORDER

In accordance with the findings of fact and conclusions of law entered herein this day,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Reopen Case, to Intervene and For Further Relief filed by the applicants for intervention is denied.

(17)

No. 89-1080

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

vs.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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[795 F.2d 1516 (10th Cir.1986)]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-1886

ROBERT L. DOWELL, an infant under the age of 14 years who sues by A.L. Dowell, his father as next friend,
Plaintiff-Appellant,

VIVIAL C. DOWELL, a minor, by her father, A.L. DOWELL, as next friend, *et al.*,
Intervening Plaintiffs-Appellants,

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated, *et al.*,
Intervening Plaintiffs,

and

YVONNE MONET ELLIOT and DONNOIL S. ELLIOT, both minor children, by and through their parent and guardian, DONALD R. ELLIOT, *et al.*,
Applicants in Intervention-Appellants,

vs.

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT No. 89, OKLAHOMA COUNTY, OKLAHOMA, A Public Body Corporate, *et al.*,
Defendants-Appellees.

[Filed June 26, 1986]

Appeal From the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-9452)

Theodore A. Shaw (Julius LeVonne Chamber and Napoleon B. Williams, Jr., with him on the briefs), New York, New York; John W. Walker, Little Rock, Arkansas; and Lewis Barber, Jr., of Barber/Traviolia, Oklahoma City, Oklahoma; for Plaintiffs and Applicants in Intervention-Appellants.

Ronald L. Day of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for The Board of Education of the Oklahoma City Public Schools, Independent District No. 89, Oklahoma County, Oklahoma, Defendant-Appellee.

William Bradford Reynolds, Assistant Attorney General, Walter W. Barnett, Mark L. Gross, and Michael Carvin, Attorneys, Department of Justice, Washington, D.C., filed an Amicus Curiae brief for the United States of America.

Before MOORE and ANDERSON, Circuit Judges, and JOHNSON, District Judge.*

MOORE, Circuit Judge.

This appeal is the latest chapter in the odyssey of the desegregation of the public school system in Oklahoma City, Oklahoma. After many years of litigation, in 1977 the trial court found that the school district had achieved

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*Honorable Alan Johnson, United States District Judge for the District of Wyoming, sitting by designation.

unitariness and entered an order terminating the court's active supervision of the case. The parties are now before this court after an unsuccessful attempt to enjoin the school district from altering the attendance plan previously mandated by the district court. The district court, in part relying on its 1977 termination order, not only denied the petitioners' motion to reopen the case, but also decided the issue of the constitutionality of the new attendance plan. *Dowell v. School Board of Oklahoma City Public Schools*, 606 F. Supp. 1548 (W.D. Okla. 1985). In this appeal, we address only the precise question of whether the trial court erred in denying the motion to reopen. We hold, under the facts present here, that the court erred and remand for additional factual determinations.

I.

This case was filed in 1961, and the history of the litigation is extensive.[1] In the ensuing years, the parties struggled through the difficult task of desegregating the public schools, each proffering plans to accomplish that goal. Finally, after finding the district had "emasculate[d]" a previously approved plan, the district court ordered the implementation of the so-called "Finger Plan." *Dowell v. School Board of Oklahoma City Public Schools*, 338 F. Supp. 1256, 1263 (W.D. Okla.), *aff'd* 465 F.2d

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[1] *See Dowell v. School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (W.D. Okla. 1963); *Dowell v. School Board of Oklahoma City Public Schools*, 430 F.2d 865 (10th Cir. 1970); *Dowell v. School Board of Oklahoma City Public Schools*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). That plan, which was instituted during the 1972-1973 school year, restructured attendance zones for high schools and middle schools so that each level enrolled black and white students. At the elementary level, all schools with a majority of black pupils became fifth grade centers which provided enhanced curricula. All elementary schools with a majority of white students were converted to serve grades one through four. Generally, the white students continued to attend neighborhood schools while black students in grades one through four were bused to classes. When white students reached the fifth grade, they were bused to the fifth grade centers, while black fifth graders attended the centers in their neighborhoods. Schools which were located in integrated areas qualified as "stand alone schools," and the students in grades one through five remained in their own neighborhoods.

In June 1975, the school board moved to close the case on the ground that it had "eliminated all vestiges of State-imposed racial discrimination in its school system, and [that it was] . . . operating a unitary school system." Although the motion was contested, the court terminated active supervision of the case because it found the Finger Plan had achieved its objective. *Dowell v. School Board of Oklahoma City Public Schools*, No. CIV-9452, slip op. (W.D. Okla. Jan. 18, 1977). *See Dowell*, 606 F. Supp. at 1551 (quoting the unpublished order in part). The order was not appealed. The 1977 order did not vacate or modify the 1972 order mandating implementation of the Finger Plan.

In February 1985, the plaintiffs sought to reopen the case, claiming the school board unilaterally abandoned

the Finger Plan and instituted a new plan for school attendance. The Student Reassignment Plan, which has already been implemented, eliminates compulsory busing of black students in grades one through four and reinstitutes neighborhood elementary schools for these grades. Free transportation is provided to children in the racial majority in any school who choose to transfer to a school in which they will be in the minority. The racial balance of fifth grade centers, middle schools, and high schools is maintained through mandatory busing. As a result of this plan, thirty-three of the district's sixth-four elementary schools are attended by students who are ninety percent, or more, of one race.

The district court denied the motion to reopen.[2] The court held that the Student Reassignment Plan was not constitutionally infirm and, therefore, no "special circumstances" were present that would justify reopening the case. *Dowell*, 606 F.Supp. at 1557. The court concluded as a matter of law: (1) The principles of res judicata and collateral estoppel prohibit the plaintiffs from challenging

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[2] Plaintiffs contend that the district court erred in not specifically granting their motion to intervene. Nevertheless, the court held those who sought intervention were within the ambit of the orginal [sic] plaintiff class, and those persons, through their counsel, actively participated in the hearing to reopen. They were clearly treated as party litigants even though a formal order granting them intervention was not entered. Indeed, at the outset of the hearing, the court stated that the parties "did meet the requirement to be a plaintiff." As a practical matter,the appealing parties were allowed to intervene despite the order denying all relief prayed for; therefore, within the peculiar context of this case, we conclude the issue is moot and the appealing persons are proper parties.

the court's 1977 finding that the school system was unitary. (2) The 1985 school district displays all indicia of unitariness. (3) Neighborhood schools, when impartially maintained and administered, are not unconstitutional. Moreover, the existence of racially identifiable schools, without a showing of discriminatory intent, is not unconstitutional. (4) The Student Reassignment Plan is not discriminatory and was not established with discriminatory intent.

On appeal, the plaintiffs contend the trial court erred in arriving at these conclusions without reopening the case and without giving them as adequate opportunity to present evidence on the substantive issues. We agree and hold that, while the principles of res judicata may apply in school desegregation cases, a past finding of unitariness, by itself, does not bar renewed litigation upon a mandatory injunction. Moreover, when it is alleged that significant changes have been made in a court-ordered school attendance plan, any party for whose benefit the plan was adopted has a right to be heard on the issue of whether the changes will effect the unitariness of the system. In such circumstances, it is not necessary for the party seeking enforcement of the injunction to prove the changes were motivated by a discriminatory intent. Accordingly, we conclude the trial court erred in not reopening the case.

II.

A.

Any analysis of the legal principles governing this case must start with the procedural framework in which

it was postured when the plaintiffs sought to reopen. When the defendant board adopted the Student Reassignment Plan, the 1972 order approving the Finger Plan and ordering its immediate implementation still governed the parties. That order was in the nature of a mandatory injunction, and the effect of that order was not altered by the 1977 order terminating the court's active supervision of the case.

Perhaps the members of the present school board acted upon the belief that the 1972 order was no longer effective; if so, their belief was unwarranted. Indeed, the 1972 order specifically provided:

> The Defendant School Board and the individual members thereof, *both present and future*, together with the Superintendent of Schools, shall implement and place [the Finger Plan] into effect . . . .
>
> The Defendant School Board shall not alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court. If the Defendant is uncertain concerning the meaning of the plan, it should apply to the court for interpretation and clarification.

Dowell, 338 F.Supp. at 1273 (emphasis added).

Nothing in the 1977 order tempered the 1972 mandatory injunction. In fact, the 1977 order states:

> The Court has concluded that . . . [the Finger Plan] was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan

> or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.
>
> . . . The Court believes that the present members *and their successors* on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Dowell, No. CIV-9452, slip op. at 1 (W.D. Okla. Jan. 18, 1977) (emphasis added).

In light of these statements reinforcing the importance of the remedial injunction and the lack of any specific or implied alteration of that remedy, we must conclude the court intended the 1972 order to retain its vitality and prospective effect. Therefore, the competing interests of both parties must be assessed first within the penumbra of the outstanding 1972 order. To do otherwise renders all of what has occurred since 1961 moot and mocks the painful accomplishments of sixteen years of litigation and active court supervision.

As amicus, the government argues that once a finding of unitariness is entered, all authority over the affairs of a school district is returned to its governing board, and all prior court orders, including any remedial busing order, are terminated. According to the government, the defendants could not be compelled to follow the Finger Plan once the court determined the district was unitary. We find the contention without merit. The parties cannot be thrust back to the proverbial first square just because the court previously ceased active supervision over the operation of the Finger Plan.

While there are sound reasons for courts to seek the earliest opportunity to return control of school district affairs to the local body elected for that purpose, those reasons do not require abandonment of the inherent equitable power of any court to enforce orders which it has never vacated. The court's authority is not diminished once the original case has been closed because the viability of a permanent injunction does not depend upon this ministerial procedure. *See Ridley v. Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970). Therefore, termination of active supervision of a case does not prevent the court from enforcing its orders. If such were the case, it would give more credence to the ministerial function of "closing" a case and less credence to the prospective operation of a mandatory injunction.[3] *See Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952).

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[3] The Fourth Circuit has taken a different view with which we cannot agree. In *Riddick v. The School Board of the City of Norfolk*, No. 84-1815, slip op. (4th Cir. 1986), the court seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect. The court makes a bridge between a finding of unitariness and voluntary compliance with an injunction. We find no foundation for that bridge. It also appears inconsistent with *Lee v. Macon County Board of Education*, 584 F.2d 78 (5th Cir. 1978), in which the court held that a finding by the district court that the school system was "unitary in nature" did not divest the court of subject matter jurisdiction of a petition to amend the desegregation plan where the court had not dismissed the case. A finding of unitariness may lead to many other reasonable conclusions, but it cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance.

The government's position ignores the fact that the purpose of court-ordered school integration is not only to achieve, but also to *maintain*, a unitary school system. *Keyes v. School District No. 1, Denver, Colo.*, 609 F. Supp. 1491, 1515 (D. Colo. 1985).[4] When the district court terminated active supervision over this case, it acknowledged that the original purpose of the law suit had been achieved and that the parties had implemented a means for maintaining that goal. *Dowell*, 606 F. Supp. at 1551 (1977 termination order). However, without specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of segregation.

We therefore see no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court. *See Swann*, 402 U.S. at 15-16. When a federal court has restored unsupervised governance to a board of education, the board must, like any other litigant, return to the court if it wants to alter the duties imposed upon it by a mandatory

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[4] *See also Lee v. Macon County Board of Education*, 584 F.2d 78, 81 (5th Cir. 1978) (after full responsibility for educational decisions has been returned to public school officials by the court, they "are bound to take no actions which would reinstitute a dual school system"); *Graves v. Walton County Board of Education*, 686 F.2d 1135 (11th Cir. 1982), *aff'g in part, rev'g in part*, 91 F.R.D. 457 (M.D. Ga. 1981) (despite an earlier finding that desegregation had been accomplished, the courts reject a modification of the 1968 desegregation plan which would effectively resegregate the system).

decree. *Vaughns v. Board of Education of Prince George's County*, 758 F.2d 983 (4th Cir. 1985). *See also Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). It is only when the order terminating active supervision also dissolves the mandatory injunction that the governing board regains total independence from the previous injunction.

B.

The record in this case indicates that the defendants, unilaterally and contrary to the specific provisions of the 1972 order, have taken steps to avoid the duties imposed upon them by a continuing decree. By implementing the Student Reassignment Plan, the defendants have acted in a manner not contemplated by the court in its earlier decrees. The Plaintiffs now are simply attempting to reassert the validity of the 1972 order and to perpetuate the duties placed upon the district.

When a party has prevailed in a cause for mandatory injunction, that party has a right to expect that prospective relief will be maintained unless the injunction is vacated or modified by the court. *See W.R. Grace and Co. v. Local 759, International Union of United Rubber Workers of America*, 461 U.S. 757 (1983). *See also GTE Sylvania, Inc. v. Consumers Union of United States*, 445 U.S. 375 (1980). To make the remedy meaningful, the injunctive order must survive beyond the procedural life of the litigation and remain within the continuing jurisdiction of the issuing court. *E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); 11 Wright & Miller, Federal Practice and Procedure § 2961 (1973). This

binding nature of a mandatory injunction is recognized in school desegregation cases. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439 (1976).

Thus, the beneficiary of a mandatory order has the right to return to court to ask for enforcement of the rights the party obtained in the prior litigation. To invoke the court's authority, the part seeking enforcement must establish that the injunctive decree is not being obeyed. *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979).

C.

Although prospective orders must be obeyed, federal courts are also empowered to alter mandatory orders when equity so requires. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *System Federation No. 91, Railway Employee's Department v. Wright*, 364 U.S. 642 (1961); *United States v. Swift & Co.*, 286 U.S. 106 (1932). We have previously adopted the rationale behind these cases in establishing guidelines "applicable in all instances where . . . the relief sought is escape from the impact of an injunction." *Securities and Exchange Commission v. Jandal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970).

Given the mandatory nature and prospective effect of an injunctive order, changes in injunctions must not be lightly countenanced but must be based upon a "substantial change in law or facts." *Securities and Exchange Commission v. Thermodynamics, Inc.*, 464 F.2d 457, 460 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). A change in attitude by the party subjected to the decree is not enough of a change in circumstances to warrant withdrawing the

injunction. *Id.* Therefore, when a party establishes that another has disregarded a mandatory decree or has taken action which has resulted in a deprivation of the benefits of injunctive relief, the court cannot lightly treat the claim. Having once determined the necessity to impose a remedy, the court should not allow any modification of that remedy unless the law or the underlying facts have so changed that the dangers prevented by the injunction "have become attenuated to a shadow," *Jan-dal*, 433 F.2d at 305, and the changed circumstances have produced " 'hardship so extreme and unexpected' as to make the decree oppressive." *Safeway*, 611 F.2d at 800 (quoting *Swift & Co.*). *see also United States v. United Shoe Machinery Corp.*, 391 U.S. at 251-52. Indeed, this "difficult and . . . severe requirement" is necessary to be consistent with res judicata principles. *Thermodynamics*, 464 F.2d at 460.

D.

The court's 1972 order requiring implementation of the Finger Plan was binding upon both sides. More pointedly, the order specified that the defendants were not to "alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court." *Dowell*, 338 F.Supp. at 1273. While defendants unilaterally could not take action contrary to the plan, plaintiffs also could not expect more than the approved plan provided. When, five years later, the court determined that the implementation of the Finger Plan had resulted in unitariness within the district, that finding became final, and it, too, is binding upon the parties with equal force. Yet, that historical finding does not preclude the plaintiffs from asserting

that a continuing mandatory order is not being obeyed and that the consequences of the disobedience have destroyed the unitariness previously achieved by the district.

Thus, while the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977, it erred in curtailing the presentation of evidence of changes that have since occurred. Consequently, plaintiffs were deprived of the opportunity to support their petition for enforcement of the court's prior order.

In reaching this conclusion, we are not traveling new trails. We contrast this case with the *Spangler* line of cases[5] in which as aggrieved party sought remedial relief in addition to the previous decree. Here, the plaintiffs do not seek the continuous intervention of the federal court decried by the Supreme Court. We are not faced with an attempt to achieve further desegregation based upon minor demographic changes not "chargeable" to the board. *Spangler*, 427 U.S. at 435. Rather, here the allegation is that the defendants have intentionally abandoned a plan which achieved unitariness and substituted one which *appears* to have the same segregative effect as the attendance plan which generated the original lawsuit.

Given the sensitive nature of school desegregation litigation and the peculiar matrix in which such cases exist, we are cognizant that minor shifts in demographics or minor changes in other circumstances which are not

[5] *Spangler v. Pasadena City Board of Education*, 375 F. Supp. 1304 (C.D. Cal. 1974), *aff'd* 519 F.2d 430 (9th Cir. 1975), *vacated*, 427 U.S. 424 (1976), *on remand*, 549 F.2d 733 (9th Cir. 1977).

the result of an intentional and racially motivated scheme to avoid the consequences of a mandatory injunction cannot be the basis of judicial action. *See Spangler*, 427 U.S. at 434-35; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). However, when it is asserted that a school board under the duty imposed by a mandatory order has adopted a new attendance plan that is significantly different from the plan approved by the court and when the results of the adoption of that new plan indictate a resurgence of segregation, the court is duty bound either to enforce its order or inquire whether a change of conditions consistent with the test posed in *Jan-dal* has occurred.

Therefore, consistent with traditional concepts of injunctive remedies in federal courts, plaintiffs have the right to a full determination of whether and to what extent their previously decreed rights have been jeopardized by the defendants' actions subsequent to the entry of the mandatory decree. Moreover, we hold the plaintiffs' assertion that the defendants abandoned the Finger Plan without court approval constitutes the "special circumstances" the trial court found absent from the case. The existence of these circumstances should have been recognized by the trial court as a basis for relief under Fed. R. Civ. P. 60(b), and the court's failure to do so results in manifest abuse of discretion which requires reversal. *See Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062 (10th Cir. 1980).

III.

Having concluded the district court erred in not granting plaintiffs' motion to reopen, we must decide

whether the error is significant in light of the court's factual findings on the board's new plan. After review of the evidence, which led the district court to hold the new plan was not constitutionally infirm, we conclude that reversal will not be futile.

The record indicates that the hearing from which the court's findings were drawn was called for a narrow purpose. The order setting the hearing provided:

> [T]he motion to intervene and reopen and the defendants' response join the issues, and the matters in them are set for evidentiary hearing . . . at which time *the question of whether the case shall be reopened and the applicants allowed to intervene shall be tried and disposed of.*

(Emphasis added.) From the outset, then, the only issues the parties were notified to present to the court dealt with reopening and intervention. The court did not indicate that it intended to hear evidence upon or determine the substantive constitutional issues relating to the plan or its effects.

Plaintiffs now argue they were unprepared to be heard on the ultimate issues. Indeed, on two occasions plaintiffs' counsel inquired whether the only issue to be heard was that of reopening, and the court replied affirmatively. Hence, plaintiffs argue their understanding of the limited scope of the hearing curtailed their cross-examination of the defendants' witnesses and prevented them from introducing evidence of alternative plans. Our review of the record supports this assertion. While evidence bearing on the substantive issue was presented, it focused on the underlying reasons for reopening the case rather than on the ultimate constitutional issue.

In reaching the substantive issues, the district court also improperly recast the burden of proof. As we have already noted, the plaintiffs, as the beneficiaries of the original injunction, only have the burden of showing the court's mandatory order has been violated. *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979). The defendants, who essentially claim that the injunction should be amended to accommodate neighborhood elementary schools, must present evidence that changed conditions require modification or that the facts or law no longer require that enforcement of the order. *See E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980).

Thus, by placing the burden on the plaintiffs to show the school district was not longer unitary, the court changed the usual course of what in reality is a petition for a contempt citation. The Plaintiffs were required not only to prove the mandatory injunction had been violated, but also that the violation contravened the constitution. In the framework of *this* case, the latter element was beyond the scope of the hearing and certainly never the plaintiffs' burden.

Accordingly, we believe the trial court reached the merits prematurely. We applaud the court's effort to bring speedy resolution to a difficult issue, but fairness and our understanding of the procedures governing federal injunctive remedies require us to conclude the court did not give the moving parties ample opportunity to develop substantive issues.

We have confined our analysis to the narrow issue of the plaintiffs' right to reopen; therefore, our holding

should not be construed as addressing, even implicitly the ultimate issue of the constitutionality of the defendants' new school attendance plan. The judgment of the trial court is reversed and the case is remanded for further proceedings to determine whether the original mandatory order will be enforced or whether and to what extent it should be modified.

[RECORD, VOLUME I, doc. 17]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, et al., Plaintiffs,	:	CIV-61-9452-B
v.	:	
BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, et al., Defendants.	:	

FINAL PRETRIAL ORDER

Date of Conference: June 4, 1987
Appearances: Lewis Barber, Jr., Oklahoma City, Oklahoma, for plaintiffs
John W. Walker, Little Rock, Arkansas, for plaintiffs
Theodore M. Shaw, New York, New York, for plaintiffs
Norman J. Chachkin, New York, New York for plaintiffs
Ronald L. Day, Oklahoma City, Oklahoma, for defendant
Laurie W. Jones, Oklahoma City, Oklahoma, for defendant

I. Preliminary Statement

This case is before the Court pursuant to the remand directions of the United States Court of Appeals for the Tenth Circuit, 795 F.2d 1516 (10th Cir.), *cert. denied*, 93 L. Ed. 2d 370 (1986).

In 1972 this Court granted plaintiffs injunctive relief designed to dismantle the dual school system in Oklahoma City. 338 F. Supp. 1256 (W.D. Okla.), *aff'd* 465 F.2d

1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). On January 18, 1977 the Court entered an Order finding that the Board had carried out the injunction and has "slowly and painfully accomplished" the goal of establishing a "unitary system." The Order dissolved the Biracial Committee previously created and directed that "Jurisdiction in this case is terminated . . . " but it did not by its terms vacate or dissolve the injunctive relief granted in 1972.

From the 1972-73 school year through the 1984-85 school year, the public schools of Oklahoma City were operated consistent with the 1972 decree. Although changes in pupil assignments were made from time to time during those years (for example, as schools were closed due to declining system-wide enrollment), the school system continued to utilize the techniques of pairing, clustering, and compulsory transportation at the elementary level that had been the essential feature of the assignment plan approved and ordered into effect in 1972.

Effective for the 1985-86 school year, the Board of Education adopted a new plan for pupil assignment in grades 1-4 which eliminated pairing and clustering, substituting a "neighborhood school" assignment plan which eliminated compulsory transportation at those grade levels and utilized zone lines similar to those employed for elementary school assignments prior to 1972. Under this method of pupil assignment, some K-4 elementary schools in the district became predominantly Black for the first time since 1972. (Fifth-grade centers were relocated throughout the school district rather than being placed only in the northeastern section of the city and

these schools, like those serving grades 6-12, remain desegregated.)

The plaintiffs sought to intervene new class representatives and to reopen this action in 1985, to challenge the decision of the school board to alter the basic method of pupil assignment at grade levels 1-4. This Court denied relief, but the Court of Appeals has remanded for a determination whether the school board can establish sufficient justification for the Court to dissolve or modify the 1972 injunctive decree. *See* 795 F.2d at 1521-22. On February 5, 1987, the Court granted the Petition for Intervention and plaintiffs' Motion to Reopen, and set the matter down for hearing on the merits.

In these remand proceedings, the burden of proof rests with the school board. "The defendants, who essentially claim that the injunction should be amended to accommodate neighborhood schools, must present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of [1972] order." *Id.* at 1523.

II. Stipulations

A. All parties are properly before the Court.

B. All parties have been correctly designated.

C. After exchanging and reviewing the exhibits, although there are some objections the parties have agreed to stipulate as to the admissibility of many exhibits. These stipulations are detailed in Part IV of the Pre-Trial Order *infra*.

F. Legal Issues:

The primary legal issues presented in the current posture of the case are:

1. Have conditions or circumstances so changed since entry of this Court's 1972 decree that it should be dissolved or modified to permit use of defendants' "neighborhood school" assignment plan for school attendance in grades 1-4?

2. If such dissolution or modification is warranted, is the school board's 1985 plan constitutional?

3. Has the school district maintained a unitary school system since 1977?

4. May plaintiffs seek modification to alter the form of relief provided through the 1972 decree, and what showing must plaintiffs make to justify such relief?

G. Factual Issues*:

1. Are the elementary schools with enrollments greater than 90% Black under the school board's 1985 student assignment plan for grades 1-4 vestiges of the prior dual school system?

2. Is the residential segregation which exists in Oklahoma City today a vestige of previous unlawful state-compelled segregation?

3. How has white student enrollment in the Oklahoma City Public Schools changed since 1972,

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* The parties have attempted to identify major factual issues. However, it should be noted that the parties are not in agreement about the significance of each. Plaintiffs believe that, with respect to some of the these areas, the facts articulated in support of the decision to adopt the 1985 plan, even if true, are insufficient as a matter of law to justify that plan. The school board believes that each of the factual issues is material to the legal determinations which the Court must make. Both parties agree that no single factual issue is necessarily outcome-determinative.

and what further changes would result from resumption of the Finger Plan for elementary schools or from implementation of the plans proposed by plaintiffs?

4. Did the school board adopt the 1985 student assignment plan without the intent to discriminate on the basis of race?

5. Did the school board adopt the 1985 student assignment plan for legitimate non-discriminatory reasons?

6. Did parental and community involvement, including PTA membership and participation, decline in the Oklahoma City Public Schools after 1972?

7. What effect has the school board's 1985 plan had, and what effect will it have in the future on parental and community involvement?

8. Did elementary school students' participation in extra-curricular activities decline in the Oklahoma City Public Schools after 1972?

9. What effect has the school board's 1985 plan had, and what effect will it have in the future on elementary school students' participation in extra-curricular activities?

10. What had been the pattern, if any, of faculty assignments to elementary schools since 1977?

11. Are present teacher assignment practices a vestige of previous unlawful state-compelled segregation, or are they motivated by discriminatory intent?

12. Did the Finger Plan result in placing a disproportionate share of the burdens of desegregation upon young Black Children in grades 1-4, and did demographic changes after 1972 increase those burdens?

13. Did the "stand-alone" feature of the Finger Plan, in combination with demographic changes after

1972, result in placing further burdens on Black children?

14. Are plaintiffs' proposed plans logistically, financially and educationally feasible?

15. Does the racial composition of public schools affect the academic and social achievement of black students?

16. Does parental and community involvement in the public schools affect the academic and social achievement of all students?

17. Is the 1985 student assignment plan being implemented in a uniform, equitable and non-discriminatory manner?

18. What are the attitudes of the school administration and the community with respect to the 1985 student assignment plan?

19. Is the implementation of the 1985 student assignment plan accomplishing the objectives of the plan?

III. Contentions

The contentions of the plaintiffs and defendants are attached hereto as Appendices "A" and "B" respectively.

IV. Exhibits

1. Attached hereto as Exhibits "C" and "D" respectively are the Exhibit Lists of the plaintiffs and defendants. Exhibits not listed will not be admitted by the Court unless good cause be shown and justice demands their admission.

2. The parties stipulate that the following exhibits may be received in evidence without objection (the parties reserve the right to argue to the Court concerning the weight properly to the accorded to any exhibits):

Plaintiffs' Exhibits 1-29, 36-40, 47, 55, 56, 58

Defendants' Exhibits 1-6, 20-21, 24, 28, 34-37, 41-48, 57, 60-84, 88, 90-109, 111-121, 123-132, 134-137, 141-148, 151-160, 162-164, 172-174, 179-184, 187-196, 201-210

3. Plaintiffs agree to the introduction into evidence of the following exhibits subject to defendants' willingness to stipulate as indicated:

a. Defendants' Exhibit 7, if it is stipulated that the exhibit is based upon Defendants' Exhibit 28; and if it is stipulated that the exhibit is a demonstrative representation of only *selected* Black population relocations in the Oklahoma City School District in the years indicated, that is, Black students, living within the area indicated who were enrolled in kindergarten in the district during the 1974-75 school year; and if it is stipulated that the exhibit does not indicate the number of students who, according to the records of the district, resided at the same address in 1977-78; and if it is stipulated that the figure "209" labelled "to Non-ISD" on the exhibit represents the number of 1974-75 Black Kindergarten students whose names were not found on the district's enrollment records in the 1977-78 school year or for whom the district's enrollment records did not indicate an address, rather than the number of 1974-75 Black Kindergarten students for whom the district had an out-of-ISD 89 address in the 1977-78 school year.

b. Defendants' Exhibit 8, subject to the presentation of an adequate foundation explaining the manner in which the data from which the exhibit was prepared were gathered and analyzed, if stipulations similar to those described above for Defendants' Exhibit 7 are made concerning the selective character of the population movements analyzed, the fact that the exhibit does not include an indication of the number of students who did not move, and the meaning of the label "To Non-ISD."

c. Defendants' Exhibit 9, subject to the presentation of an adequate foundation explaining the manner in which the data summarized in part (b) of the exhibit were gathered and analyzed, and if it is stipulated that the data summarized in part (a) are from Defendants' Exhibit 28; and if it is stipulated that the numbers indicated as being "no longer in district" represent students whose names did not appear on the district's enrollment records for the later year, or for whom the district had no address on its enrollment records for the later year, rather than students for whom the district had an out-of-ISD 89 address for the later year.

d. Defendants' Exhibits 12 and 13, if it is stipulated that the exhibits are demonstrative representations of the proportions of students in grades K-12 now living within each of the "attendance areas" into which the school district has been divided who are Black, rather than representations of school enrollments.

e. Defendants' Exhibits 15-19, if the source of the data represented in these exhibits is stipulated.

f. Defendants' Exhibits 58 and 59, if it is stipulated that the term "population" on each of these exhibits refers to the trial number of K-12

students enrolled in the public schools of District I-89 for the years indicated.

4. Plaintiffs do not intend to offer into evidence their proposed Exhibits 42-45, 49, 51 or 53. At this time plaintiffs do not expect to offer Exhibits 59, 61 or 63.

5. Defendants do not intend to offer into evidence their proposed Exhibits 149 or 150.

6. The parties are unable to stipulate to the admission into evidence of the following exhibits in the absence of presentation of an adequate foundation, and they reserve the right to object to the exhibits based upon information developed during the presentation of foundation; unless otherwise indicated in this Pre-Trial Order, however, the parties are not at this time aware of other bases for objection to these exhibits:

Plaintiffs' Exhibits 41, 46, 48, 50, 52, 54

Defendants' Exhibits 11, 14, 22, 23, 25, 26, 29-33, 38-39, 40, 56, 56A, 85-87, 89, 110, 133, 138-140, 165-171, 175-178, 197-200

7. Plaintiffs object to the following exhibits on the ground of relevancy: Defendants' Exhibits 38, 39, 49-55, 186.

8. Defendants object to the following exhibits on the ground of relevancy: Plaintiffs' Exhibits 30-35, 48, 57.

9. Plaintiffs object to the following exhibits on the ground of hearsay: Defendants' Exhibits 10, 27, 186.

10. The parties reserve the right to object to the following exhibits which have not yet been completed or

withdrawn from the Clerk's Office and been made available for inspection:

Plaintiffs' Exhibits 3, 60, 62

Defendants' Exhibits 122, 161, 185

V. Witnesses

Attached hereto as Exhibits "E" and "F" respectively are the witness lists of the plaintiffs and defendants. No unlisted witness will be permitted to testify as a witness in chief except by leave of Court when justified by exceptional circumstances.

VI. Trial Briefs

The parties are submitting trial briefs simultaneously with the filing of this Pre-Trial Order.

The Court has ordered that proposed Findings of Fact and Conclusions of Law be submitted within two weeks of the conclusion of the trial herein.

VII. Estimated Trial Time

Five to ten days.

VIII. Possibility of Settlement

Good ___ Fair ___ Poor X

All parties approve this Order and understand and agree that this Order supersedes all pleadings and shall not be amended except by Order of the Court.

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APPROVED this ___ day of _____, 1987.

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LUTHER BOHANAN
UNITED STATES
DISTRICT JUDGE

APPENDIX "A"

Plaintiffs' Contentions

1. Circumstances and conditions have not changed since entry of the Court's Order in 197[illegible] so as to provide legal justification for the modification or dissolution of the decree sought by the school board.

The purpose of the 1972 Order was to eliminate pupil segregation at all grade levels from the Oklahoma City Public Schools. The Court explicitly found that a system of geographic zoning (often referred to as "neighborhood schools") for pupil assignments was insufficient to achieve that purpose in Oklahoma City because of the pattern of intense racial residential segregation and the deliberate location of schools for students of each race in areas of racial residential concentration.

Moreover, the Court has found in this case that the pattern of residential segregation, and specifically the overwhelming concentration of Black residents in northeastern Oklahoma City, was the result of deliberate discriminatory policies enforced and maintained as the public policy of the State of Oklahoma and of school authorities' actions.

These underlying conditions have not been altered since entry of the Court's 1972 decree:

(a) Although the public schools of the district were desegregated between 1972-73 and 1984-85, all of the demographic exhibits to be introduced at the hearing indicate clearly that the northeastern portion of Oklahoma City is today as nearly exclusively Black as it was in 1972.

(b) At the 1985 hearing, the President of the school board testified that the attendance zones adopted for K-4 pupil assignment in 1985-86 and 1986-87 were "the same neighborhood boundaries as have existed for years" (Tr. 336). A comparison of the attendance zones used by the district for elementary schools in the early 1960's, in 1970, and currently, confirms this statement.

(c) As the enrollment figures demonstrate graphically, reimposition of those zoning patterns on the unchanged areas of minority residential concentration in the school district results in precisely the consequences which the 1972 Order was intended to prevent: the creation of a set of virtually all-Black elementary schools, enrolling a substantial proportion of all Black students in the district at grade levels K-4 or 1-4. Thus, the 1985-86 assignment plan for grades 1-4 uses the same pre-1972 attendance technique (geographic zoning) and many of the identical pre-1972 zones (modified principally by school closings) and produces the same segregated, virtually all-Black facilities (except for those which were closed) with which the Court was confronted in 1972.

2. Although the district's schools were desegregated between 1972-73 and 1984-85, the method of pupil assignment was not fully equitable.

The author of the plan embodied in the 1972 decree, Dr. Finger, testified without contradiction that a lack of adequate time and information accounted for his placement of only a single grade in formerly all-Black schools. As a result, all young Black children were transported out of Black residential areas for the first four years of school

(after kindergarten), without exception, while white students in the elementary grades were transported only for a single year, in the fifth grade.

This inequity was never alleviated, despite the fact that between 1972-73 and 1984-85 the school board made numerous modifications to the plan for reasons such as school closings.

Additionally, the "stand-alone school" feature of the original Finger Plan, over time, increased the burdens borne disproportionately by Black children. As new areas of the district qualified for "stand-alone" status the distances which Black students in grades 1-4 would have to be transported increased and the likelihood that schools in Black residential areas would be closed increased.

If, as plaintiffs contend, the school board is unable to meet its burden of demonstrating adequate legal justification for returning to a system of geographic zoning to assign pupils in grades 1-4, a new plan of pupil assignment for these grades consistent with the Court's 1972 decree must still be developed by defendants, since the board has voted to close 7 schools at the end of this year. Plaintiffs contend that the Court should require that such a new plan avoid the inequities of the disproportionate busing of younger Black students, and the threatened discontinuation of schools in Black residential areas which results from the Finger Plan's "stand-alone school" feature.

Even if a new plan of assignment taking account of the additional school closings did not have to be drawn, plaintiffs would be entitled to seek modification of the pupil assignment plan to allocate its burdens more fairly

between Black and white students. Such a modification would facilitate the central purpose of the decree: preserving desegregated schools and eliminating discriminatory treatment of Black students. The standard for modifying a decree so as better to achieve its goals is quite different from that which governs a defendant's request for the effective dissolution of the decree. Thus, plaintiffs' right to more equitable means of student assignment does not imply that the criteria for making the much more drastic change in the decree sought by the defendants have been established.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, et al., Plaintiffs,	)	
vs.	)	CIV-61-9452-B
THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, et al., Defendant.	)	

DEFENDANT'S CONTENTIONS[1]

1. The objective in this desegregation case was to dismantle the dual school system which existed in Oklahoma City. The purpose of the 1972 desegregation decree was to correct the condition that offended the Constitution. No child was to be excluded from any school on account of race. The remedy was designed to operate during the interim period when remedial adjustments were being made to eliminate the dual system. The need for the remedy extended until it was clear that state-imposed segregation had been completely removed. When the Board's affirmative duty to desegregate was accomplished and racial discrimination through official action was eliminated, the Court found the school system unitary. The Court's unitary finding in 1977 signified the purpose of the litigation had been achieved. The dual system had been dismantled. The School District's continued adherence to fundamental tenets of the Finger Plan at all grade levels through school year 1984-85 further insured that all vestiges of prior state-imposed segregation had been removed. Today, after 13 years of implementation, the dangers prevented by the 1972 decree have become attenuated to a shadow. Now, the particular

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[1] Defendant's contentions, as well as the legal and factual issues stipulated to in the Pretrial Order, are framed in light of the mandate of the Tenth Circuit Court of Appeals. The Defendant Board does not want to be misunderstood as waiving its previous position in this case. With all due respect to the Court of Appeals, the Board continues to believe the analysis applied by this Court in 1985, and applied by the Fourth Circuit in *Riddick v. School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986), is the correct one.

school a child attends is not determined by race. The purposes of this litigation as incorporated in the 1972 decree have been fully achieved. The achievement of the purposes of the litigation constitutes a substantial change in conditions which warrants dissolving the 1972 decree.

2. The Finger Plan appropriately served its purpose during the interim period when remedial adjustments were being made to dismantle the dual school system. However, the plan was never intended to operate in perpetuity. After 13 years, demographic changes in Oklahoma City rendered the "stand alone" school feature of the Finger Plan inequitable. The greater the number of "stand alone" schools, the greater the busing burden placed on young black children. More "stand alone" schools meant less fifth year centers. With demographic change, the "stand alone" school feature produced hardship so extreme and unexpected as to make the decree oppressive. Such a substantial change in conditions is additional justification for dissolving the 1972 decree. At the very least, it warrants modifying the decree to accomodate [sic] the Board's 1985 plan.

3. The Board of Education's 1985 Student Assignment Plan, which calls for neighborhood schools in grades K-4, does not offend the Constitution. Nor does it affect the unitary character of the School District. The Constitution does not mandate that a certain degree of racial balance be maintained in public schools. Rather, it prohibits the assignment of students to schools on the basis of their race. The mere existence of some predominantly white or predominantly black schools in a community, without more, is not unconstitutional. A neighborhood school policy violates the Equal Protection

Clause only when its adoption is motivated by discriminatory purpose. The 1985 Student Assignment Plan was not adopted with discriminatory intent. It was adopted by a unitary school district for the purpose of avoiding the progressive inequity of the "stand alone" school feature, and for the purpose of enhancing academic achievement through increased parental and community involvement in the schools. The faculties at the K-4 neighborhood schools are racially mixed. The "majority to minority" transfer policy insures that no student is compelled to attend any school where children of the student's race constitute a majority. Today, the particular K-4 elementary school a student attends in Oklahoma City is determined by the housing grades 5 through 12.

5. Any residential segregation which presently exists in Oklahoma City is not a vestige of previous state-compelled segregation. The barriers which prevented black people in the past from living in many sections of the community have long since been removed. Today, blacks are free to move, and in fact have moved into most neighborhoods in this community. Where black families live in Oklahoma City is now determined by their preferences and socioeconomic status, not by the color of their skin. The same is true with other minorities. In 1987, Orientals, Indians, Spanish and blacks are dispersed through most sections of the Oklahoma City School District. They all have the freedom to live and attend school where they choose. Oklahoma City in 1987 is remarkably will integrated. The numbers of black people who continue to reside in previous unlawfully segregated neighborhoods have decreased over the years. The fact that

some of the previous unlawfully segregated neighborhoods continue to have a high percent of blacks living there today is not the result of any action taken by the Oklahoma City Board of Education. Those people live where they do by choice. State action, past or present, does not restrict them from living elsewhere. If it were not for certain pockets of residential segregation presently existing in Oklahoma City, Plaintiffs would not have the Board engaged in the present contest. Plaintiffs would not contest the neighborhood school plan if all neighborhoods were integrated. Yet, no compulsory desegregation plan implemented by a public school system can eliminate residential segregation regardless of the length of time it is in operation. Under Plaintiffs' rationale, this Court should continue to order the busing of young students in Oklahoma City indefinitely, until such time as racial balance exists in all neighborhoods in the city. Such action would be oppressive and totally unrelated to the objective of this desegregation case, which is to insure that no child of a racial minority is excluded by school authorities from any school on account of race.

6. Plaintiffs are not asking this Court to enforce the Finger Plan. Rather, Plaintiffs are impermissibly asking this Court to award additional remedial relief, which, for the first time in the history of Oklahoma City, would require the compulsory, busing of young white children in grades 1-4. Plaintiffs' contention that white children should share the busing burden now because blacks carried the burden in the past does not square with principles of equity. In light of the unitary status of the Oklahoma City School District, it is clear that Plaintiffs

may not seek this relief. Since this school district is unitary, it no longer has the affirmative duty to desegregate. Granting such relief would be impermissibly aimed at eliminating a condition which does not offend the Constitution. The Court of Appeals noted that as most Plaintiffs were limited to seeking the enforcement of the Finger Plan. The Board of Education contends that implementation of Plaintiffs' busing proposal would: (1) work extreme financial hardship upon the School District, (2) adversely affect its "Effective Schools" Program, (3) bring about another substantial wave of white flight which would tend to resegregate the School District, and (4) constitute an abuse of the Court's remedial authority.

7. The School District was declared unitary 10 years ago, and it remains unitary today. After more than 25 years of litigation, control over the schools in Oklahoma City should be returned to its Board of Education. Its [sic] time to turn our attention to effectively educating the children in this community.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS AT HEARING CONDUCTED JUNE 15-24, 1987

RECORD, VOLUME II

WILLIAM A.V. CLARK

* * *

[p. 45] Q. Were there any changes between 1960 and 1950 that's revealed in these maps?

A. Yes. The area of concentration, the area in which blacks were concentrated has increased, and there are a number of tracts with lighter tones in the school district, but perhaps most obvious was the increase in the north-eastern areas of the school district in which the proportions of blacks had increased during this period.

But, in general, between '50 and '60, although there was some spread, some diffusion, there was still a significant concentration of black households in the inner city – the east inner city area.

Q. In your study of this district, were you able to determine why such a large percentage of blacks were living in these tracts that are shown on the map in the dark olive color?

A. Well, in Oklahoma City, as in many other metropolitan areas, there are a complex set of explanations.

We know that blacks settled near the central cities, the [p. 46] downtowns, where there were jobs available, and certainly the downtown of Oklahoma City was very different in 1950 – in the 1950's than it is today when it was much more of the center of the city. The downtown has changed a great deal in the last 30 years. And there were jobs available, so that was one element of explaining that concentration.

Another, of course, is what we do know related to the preferences and information networks that black households moving to Oklahoma City would have other contacts and would tend to find housing nearby. The housing was less expensive in those central areas, often having been vacated by other families who had moved out.

And we must, of course, also note that in the 30's there were ordinances which had the – attempted to concentrate black households in certain parts of the city.

* * *

[p. 52] DIRECT EXAMINATION (CONTINUED)

BY MR. DAY:

Q. Doctor Clark, you mentioned that the concentration of blacks in the 50's and 60's was, in part, responsible for the state compelled dual school system being implemented in Oklahoma and also ordinances which required blacks to live within these tracts; is that correct?

A. I'd like that read back. I'm not sure that's exactly what we were talking about when we ended. We were talking about the ordinances and the effect of the ordinances.

Q. All right. Well you are also aware that there was a state compelled-dual-school-system –

A. Yes.

Q. – In Oklahoma City for many years?

A. Excuse me. If that's your question, I am aware of that.

Q. Now, after 1970, in your study did you note any changes in the demographic movement of black people in this community?

A. Yes. When you look at the maps for 1970 and '80, you notice considerable change from the maps in 1950 and '60.

Q. Okay. Now, in your investigation, did you review any local ordinances or state statutes which, in you opinion, affected where black people could live in the Oklahoma City area?

A. Yes.

Q. Would you briefly tell us about those local laws?

[p. 53] A. Well, when I found that there had been these ordinances in the 30's; 1933 and '34, which had been promulgated, even though I think they were unconstitutional, given other court rulings, I was interested to know what specific responses there had been. So I looked at some of the other material, and, of course, I think those ordinances were actually declared – I think "unconstitutional" would be the correct word – in the 30's.

But during the 70's, we – beginning, of course, in 1968 with the Federal Fair Housing Rules; these were followed, specifically, in Oklahoma in 1970 with the Fair Housing decision and that was followed with a number of ordinances during the 70's which were designed to make sure that blacks had access to public accommodation, that there couldn't be discrimination in the housing market, and these – there were several of these ordinances through the 70's, culminating in 80, I think, with

the Human Rights Commission that was set up there in Oklahoma City.

* * *

[p. 55] One of the reasons, if I may just give a little background, that I do so much of my research in Europe is that Europe keeps very detailed records on population relocation. They actually have information on point-to-point moves. The U.S. does not have very much of this data.

So when I found some of the data available in a report that had been done for the school board on actual relocations of black households, I was interested in mapping it to see whether or not it would tell us something about the patterns of change over time for this period in the 1970's.

Q. Well, tell us a little bit about that study that you found.

A. I found a study by Steven Davis, a study done by the – for the school administrative group. I don't know whether he did it for the school board or whether he did it for the research group. I think he was a member of research staff at that time.

And he laboriously took the printed records, – we didn't have at that time computerized material – he took the printed records for kindergarteners who lived in the area of the so-called fifth-grade centers, and he wanted to know, for the attendance areas of those fifth-grade centers, what had happened to those pupils that were being bused out of there over time. So he was interested in knowing three years later, in 1977/78, where were those

people that were in those [p. 56] attendance areas in 1974/5, where were they living three years later.

So he actually looked at the matrix of their moves between attendance areas. He asked, "can I find a name and address in the attendance area in the center, and now where were they three years later?"

And I was able to plot that data and present the record.

Q. I believe the record, the Davis study, is in evidence as defendant's exhibit 28; is that correct?

A. I don't remember the number. I did review it, but I could look it up. I think it is.

Q. Okay, if you would, please, just confirm that for us.

A. It is. It's defendant's – it's Steven Davis, an analysis of elementary school enrollment trends, department of technical services, research and evaluation unit, Oklahoma City Public Schools, and it's defendant's exhibit 28.

Q. And that is what you used to prepare the map from?

A. That's correct.

Q. I'd like to direct your attention now to defendant's exhibit number 7.

Doctor Clark, is exhibit 7 the map that you testified you prepared from the study that Mr. Davis did?

A. That's correct.

Q. Would you explain what you're depicting here in this map?

A. What I'm doing in this map is trying to express the kinds [p. 57] of changes that were occurring during the 70's for black households who were living in the inner city east area, which has – which was still an area of concentrated black households, and I'm showing, for the data that we had for kindergarteners – it is a limited sample – for kindergarteners, where those households relocated in that three-year period,

And for those who relocated but stayed within the district, I showed that as a curved band for 149 individuals who moved but stayed within the fifth-year center areas, and I showed a band moving out of the district, that is, names and addresses who could no longer be found, 209 of them moving to non-Oklahoma independent school district areas.

Q. What information did you use to determine that these students were classified as to non-ISD area?

A. I took the Davis result that there was neither a name or address in the district, and so we can make the assumption that they moved out of the district.

But, in addition to the 177 that he so identified in his report, I added another 32 names for which there was no address but the names were present, and put that in with that category.

That's a judgment call whether they should be within the two non-ISD's or to the 149 moving within the fifth-year center area, but in that my major concern was the relocation behavior of the blacks in the district, I wasn't that concerned about [p. 58] the judgment call between the two.

Q. Would you point out the significance of these arrows for the court?

A. Yes. I plotted only moves of two persons or more. There were a number of moves of a single individual, but most of them were to nearby areas. And this gave me a general picture, and I decided that was sufficient to make the point that we have, for example, three people going from the fifth-year center areas to Harrison, seven going to Western Village, –

Q. Now, is this – you say this fifth-year center area. You're referring to the east inner part of the city that was predominantly black?

A. Yes, but it's more than the area that was predominantly black, because half of that east inner city area to the north, schools like Longfellow and Dewey and Polk, back in 1960 had very small proportions of black households.

Q. And the movements that you're talking about of students are movements of black students and their families; is that correct?

A. Yes. These are residential relocations.

Q. All right.

A. I was saying that we have seven to Western Village, four households or students and their families went to West Nichols Hills, eleven from Dewey to Edgemere, four to Putnam Heights, and so on. Four to Rockwood, two to Shields Heights, three [p. 59] down to the Bodine area, and then on the other side we have some moves from the Garden Oaks area to Star and to Spencer and so on.

Now, this means that those families came from somewhere within that fifth-year center. It wasn't that they came from a specific school, though that also could have been mapped. But Davis did map those, and it was a rather confusing picture. It was hard to get a general feeling for the kinds of changes that were going on from his map.

Q. In this map where you show the arrows going out into the other parts of the school districts, at the base of the arrow you have a circle and a number. What does that number represent?

A. That's the number I've just been reading. That's the number of students and, one assumes, their families that residentially relocated from the east inner city area to one of the other attendance districts.

Q. Were you able to determine, from the data that you reviewed, how many students or black students actually moved with their families into attendance zones where they were being bused?

A. This was one of the concerns of Davis, and in his report he notes that, of all of the relocations, only one family could be identified as having moved to an attendance area that it had previously been bused to.

[p. 60] Q. One out of how many students?

A. Well, one out of about 350, something like that, of these – these kindergarten students.

Q. Do you have an opinion with respect to why the other families located where they did in the school district?

A. Well, during the 70's there was the beginning of quite a lot of movement of black households throughout the district, and they were moving, in many cases, to areas nearby the inner city concentration, to Edgemere, to Putnam Heights, or moving to areas like Rockwood where there was some public assisted housing. There were moving, of course, to areas that they sought as white households so, where they could improve their housing, buy houses, perhaps, rather than rent in the inner city area, the kinds of standard reasons that we know apply to people seeking to move and and to residentially relocate within the city.

Q. You did a map showing the census tract population in 1980, did you not?

A. That's correct.

Q. Is that exhibit number 4?

A. I believe so. Yes.

Q. Would you identify and explain that exhibit, please.

A. Exhibit 4 is, again, Oklahoma City, the Metropolitan area, with the percent black population by tract for 1980. Again, the red line indicates the boundary of the Oklahoma School [p. 61] District, and the shading is consistent with the other maps, from white, pearl, light yellows, light greens, to darker greens, with increasing percentages black with the heavier shadings.

Q. What percent black is located in these areas with the tan shading?

A. It's between one and ten percent.

Q. In your opinion, were there any significant changes in the location of the black population between 1970 and 1980?

A. Yes, there were.

Q. Would you explain those?

A. Whereas between 1960 and '70 we saw the considerable movement to the eastern part of the county, between 1970 and '80 we saw an increasing movement to the western parts of the city and the county.

Now, those light tan shadings, that is, they're still lower percentages than the percentages moving to the eastern part of the county, but, whereas, between '60 and '70 there was eastward movement, between '70 and '80 we now have westward movement as well, such that many, many tracts throughout the city have some black households ranging between one and ten percent.

* * *

[p. 65] Q. (BY MR. DAY) Doctor Clark, thus far we've been talking about the percent of black population in various census tracts in the area over time.

In you analysis, did you examine any of the actual numbers of black population living in these various census tracts over time?

A. I did.

Q. Have you put that information in chart form so we can use it in court?

A. I have.

Q. Where did you obtain the numbers and the data for this [p. 66] exhibit?

A. This data, like the other data, is from the census tract information.

THE COURT: What exhibit is this?

MR. DAY: Beg your pardon?

THE COURT: The number of this exhibit.

MR. DAY: It's 5-D.

Q. (BY MR. DAY) Doctor Clark, explain for us what exactly is demonstrated in this chart.

A. There has been some discussion of the concentration of black households in the east inner city area, and, in examining that data and plotting it, I was concerned that the percentages might give a misleading impression, in that there is still very – there are still very significant concentrations of black households in those inner city tracts.

Therefore, I wanted to look at the absolute numbers from the area that we've called the concentrated inner city area, that is tracts 13, 27 through 30, 38, and 79. I wanted to look at the aggregate or the raw numbers for those tracts.

Q. Would you show us the location of those tracts on exhibit number 4.

A. The tracts that I'm speaking of are the tracts here, 13, 28, 29, 38, 30, and 27.

Q. Go ahead with your explanation.

A. I was able to determine the numbers of the total popula- [p. 67] tion and the black population for each of those tracts and to show, to get right to the point, that, whereas in 1960, for example, to take just two examples, tract 27 had almost 2,700 blacks, in 1980 it had only 22. In tract 29 there was 3,684 blacks. In 1960 there were 447.

Q. You mean '80?

A. In 1980.

So that what we see is a significant change in the absolute numbers of blacks, of course, as that area has undergone demographic transition.

Q. What about tract 30 and 38?

A. Well, tract 30 went from 5,000 in 1960 to 853. Tract 38 went from 3,324 in 1960 to 912 in 1980.

Q. Were you able to determine the percent of the black population living in the metropolitan area which chose to live in the tracts that you've identified as of 1960?

A. Yes. By taking the 19- – taking the data for the total metropolitan area that was black, and then taking the proportion and summing up the number in these seven tracts and putting it over as a ratio, I was able to show that somewhat more than 80 percent in 1960 and in 1950 were in these seven tracts, but by 1980 it was less than 17 percent.

Q. Do I understand you correctly that in 1980 only 16.8 percent of the black population in Oklahoma City resided within these tracts?

[p. 68] A. In Oklahoma City Metropolitan area resided in these tracts.

Q. And that in 1960, 84 percent of all blacks in the metropolitan area resided in these tracts?

A. That's correct.

Q. Have you personally been to these areas of this community?

A. Yes.

Q. In these tracts where we have a dramatic drop in numbers, what do you see when you drive through?

A. Well, I was interested in going to these areas, given the significant change in population, and some I could work out just from examining maps. For example, I-40 and the 35 interchange certainly had a dramatic impact in tract 29.

But what we have, of course, is an area that was undergoing land use transition, there were developments of institutions in the area, the freeway system, and now the Broadway extension is having a considerable impact as further transportation developments in the area require the clearing of residential use in that region.

Q. Does the census data show the amount of population turnover within a given tract?

A. Yes. You can get a general idea of turnover from the census tract data.

* * *

[p. 71] mobility, and we find that the mobility rates have dropped on average, oh, nine percent over that period,

and you can see it specifically in individual tracts. But the turnover rates in 38 and 30 are still quite high.

Q. What's the significance of that high turnover rate?

A. Well, the significance to me is that there's a fair amount of population change going on in the area. It's not a stable area. People are coming and going. People are choosing to live there and to move away from there.

Q. In your analysis of this school district, did you become familiar with the total black population in the community over time? The numbers?

A. Yes.

Q. Do you have an opinion as to where the blacks that were previously living in these tracts went which would account for this substantial drop in numbers from '60 to '70 to '80?

A. Well, if you look at the charts and the maps that I've prepared previously, we have an expansion of the black population throughout the region. Some of them certainly came from this region. I'm not – certainly not saying they all came from here, because this just says whether or not you're living in the same house. You may have moved down the street, and often people do that around the block.

But we know that the black population expanded, we know it was living throughout eastern and increasingly western parts of [p. 72] the city and the county. Some of that population came from the inner city area.

Q. Doctor Clark, I'd like to direct your attention now to defendant's exhibit number 6, which is in the book in front of you there, and I would ask that you identify and explain that exhibit, please, sir.

A. This is a chart which gives data on the population growth/change in the Oklahoma City Metropolitan area, and it is an attempt to look at the kinds of demographic changes that were going on in a very broad-brush approach.

And I divided the district that I was concerned with into – the Oklahoma City School District in three parts, then Eastern Oklahoma County, Northern Oklahoma County, Western Oklahoma County, and part of Canadian County.

I didn't do the total metropolitan area. I though this would be sufficient to examine the kinds of changes going on in the region between 1960 and 1980.

Q. And what sort of change did you note in that period of time?

A. I presented the data in the chart for 1960 to '70, for '70 to '80, and 1960 to '80 as an aggregate, and I think the points can be made quite simply. There was, in the Oklahoma City School District in the major – the central core, the largest area, a loss of about 40-, almost 43,000 whites, and a gain of 13,000 blacks.

* * *

[p. 76] Q. Were you able to determine how many black families actually moved into an attendance zone where their child was being bused?

A. Yes. I also asked for that part of the run to be done, and there were eleven families who had relocated to attendance areas that they'd previously been bused to.

Q. And approximately how many families relocated in attendance areas other than those where their children were being bused?

A. Approximately 250, but we'd have to add it up exactly.

Q. Do you place any significance on that figure?

A. Well, I was interested in this, because I have been examining the issue of whether or not busing or moving children from one attendance area to another will integrate the residential area, and I think this is evidence that it does not integrate the residential area. The residential areas change [p. 77] from a long series of decisions made by individual families, and simply busing a child from one attendance area to another will not, in and of itself, integrate that residential area.

Q. Do you have an opinion as to why these black families were moving into other areas of the school district during the 80's?

A. Yes.

Q. What is your opinion?

A. I think they're moving there for the reasons that families move in general. They're moving there because they could own a house, perhaps, instead of rent, or they could find a house they could afford; they were moving there because there were other families of similar socioeconomic status; they are moving there for reasons of

preference, they liked the area; or, in the case of Rockwood, they were moving there because they could get housing that they could afford, publicly assisted housing.

* * *

[p. 82] Later I was asked by the U.S. Commission on civil rights to attend a consultation and hearing and to write a paper for that hearing, which I did, and it was published as part of a proceedings.

I then, with the permission of the commission, revised that paper, and it was accepted for publication in population research and policy review.

Q. When did the commission on civil rights ask you to do the study and present your findings to them?

A. That was in the fall of 1985.

Q. I'd like to direct your attention to defendant's exhibit number 10 and ask you if that is a true and correct copy of the article on residential segregation which you originally did for the U.S. Commission on Civil Rights.

A. It is, with the proviso that in preparing the paper for publication, part of the article that was presented to the U.S. Commission on Civil Rights is not included in here, and, of course, it's been subject to considerable revision with peer group review and editorial input. But it is substantially the same.

* * *

[p. 84] And I began work on trying to assess the relative role of each of the many factors that had been thought to influence patterns of residential neighborhoods in cities, and the request from the civil rights

commission came at an opportune time, because I was able to take the period of my research and review a large number of studies and put them into a context, and was able to show in that paper and in the published paper that we have what I believe are a set of factors, which includes economics and housing affordability and income, preferences and social relationships, what I call urban structure and structure of cities, and elements in the past of discrimination. That these four groupings summarize the different things that have been at work in the cities to influence the patterns of residential separation.

Q. How about current private discrimination? Do you find to any extent that is one or a part of the factors you must consider when you're determining the causes of residential segregation?

A. When you say "current," you're talking about the present time, and we know that private discrimination in the past was a factor in accounting for patterns.

But currently the work that's ongoing, and I report two surveys that were done in the civil rights paper where specific [p. 85] questions were asked of black households about whether they had been discriminated against on the basis of race in attempts to secure housing and who was responsible, and something on the order of two to three percent of the respondents indicated that they had – they had been subject to private discrimination.

So it is a much smaller factor today than it was 30 years ago.

Q. Addressing the causes of residential segregation today, what part did you find that personal preferences played?

A. In looking at the various factors, again beginning with some studies by sociologists in the 60's, people were interested in the question of why you got some of these concentrations and to what extent what people desired was a basis for that, and the early studies established quite quickly that what we've called the gap between black and white preferences is quite important in understanding patterns.

If you ask whites the kinds of neighborhood compositions that they would like, their preferences, they tend to report in the range of zero to 20 percent minority, depending on the city, – I say "minority" because it may be black or Hispanic – and perhaps in the range 80 to 90 percent white. We find that 80-20 is a commonly-expressed view for white households. Black households commonly express a view of wanting 50-50 neighborhoods, 50 percent blacks, 50 percent whites.

And so we have this separate – this distinct view of the [p. 86] kinds of neighborhood compositions that whites and blacks want, and that, of course, leads to a gap in the preferences such that it's very difficult to maintain stably integrated neighborhoods.

Q. Today what part does economic status play?

A. I've – I've always felt that the attempts to down play the role of income in terms of explaining patterns of residential separation have been perhaps too great. I think income is a very important element, and we see it

in the gains in black incomes that were made in the 70's and the 60's. Given those gains, we see it being expressed in the spatial pattern of black households.

But it's true that you can find cheap housing in the suburbs as well as in the central cities, so it's not a complete explanation, and I like to turn beyond income to looking at assets.

The fact that white households, in general, have somewhere on the order of ten times the assets that black households have, independent of house value, is a very powerful explanation in terms of the inability in the past for black households to enter the homeowner market simply because of the down payments required.

So these are very important elements of understanding why economics does play a role, just the ability to afford homeownership, and, of course, the suburbs are largely – were [p. 87] largely, I should say, because there are changes going on – were largely homeownership. So we have some understanding why we don't find more blacks in the suburbs in the 50's and 60's.

Now, during the 70's and into 80's, we're seeing more black suburbanization.

Q. And did you find that true in your study of the Oklahoma City School district?

A. I would say that the movement of black households into the Eastern Oklahoma – Eastern Oklahoma Metropolitan Area is an expression of that – to some extent, that spread to suburbs outside of the city.

Now, we have do [sic] be careful, in that the city of Oklahoma City is a very large city unit. Many cities are

smaller, and so we talk about suburbs and cities. But, of course, there are suburbs within the city of Oklahoma City.

Q. How does urban structure affect residential separation?

A. Urban structure is a term we use to describe the relationships of cities and suburbs, the patterns of transportation, and the behavior of individuals.

For instance, we know from a large number of studies that households tend to move nearby. Your prior address is a very good indication of where you're likely to move to. If you're located in a particular – excuse me – area of the city, it's a good indication of the fact that you'll move somewhere nearby. It isn't always true or for every individual, but, on [p. 88] average, people tend to move relatively short distances.

That element of the urban structure explains why we have patterns of growth such that the spread is often from a previously concentrated area.

Q. Doctor Clark, do you have an opinion as to whether or not today there are local or state governmental barriers which compel black people to reside in the tracts that we've been talking about in the east inner part of the city?

A. I do.

Q. And what is your opinion?

A. I think if you review the factual information that I've brought together; if you look at the extent to which black households live throughout the Metropolitan Area,

the fact that a very small proportion of the total black population lives in that concentrated area, something around under 17 percent; if we look at the rates of turnover, the fact that many of those people are no longer living in the same house, so they have been expressing residential decisions to live in other houses nearby; if we look at the movement of black households from the inner city district via the maps of residential relocations; if we consider that, in addition to the affirmative actions taken with the fair housing laws of 1968 at the national scale, 1970 at the local scale, I come to the conclusion that there are not barriers affecting the concentration of black households in the inner city area.

* * *

[p. 93] CROSS-EXAMINATION

BY MR. CHACHKIN:

Q. Doctor Clark, on Exhibits 5-D and 5-E which are the charts showing population change for selected census tracts in the northeast portion of Oklahoma City, why did you select only these tracts and not additional tracts in the northeast section of the city?

A. They were the inner city tracts that had the greatest concentrations of black households in 1950 when I looked at the map, and, as that was of some concern in this litigation, I focused on those tracts.

Q. Do you know whether these tracts that you have selected encompassed the school attendance areas for all or most of the schools that were more than 90 percent black in 1972, just before entry of the court's order requiring the implementation of the Finger Plan?

A. They probably encompassed a large number of those schools, but there were some areas that had a large black population to the north of these tracts that, by 1970, would have had schools [p. 94] with large numbers of blacks.

So, to answer your question, it probably does not accomplish an overlap with all of the schools.

Q. And you haven't studies the tracts that were left out of these exhibits to see if they suffered the same proportion – excuse me – proportionate diminution in absolute numbers or whether they actually increased in the numbers of residents between 1960 and 19___ – or 1950 and 1980; is that correct?

A. I did examine those, and those tracts increased in the numbers of blacks.

Q. But they're not reflected on here, so this is a subset of the area in which more than 90 percent black schools were located in 1970 that coincides generally with diminishing population trends?

A. The aim of the analysis was to look at the previous concentration of black household residentially in 1950 and 1960, not the 90 percent black schools. That would be a different analysis.

* * *

[p. 105] Q. Now, Doctor Clark, you mentioned the importance of personal preferences in explaining the pattern of residential movement, and you referred to surveys indicating that whites generally wanted to live in areas that were 20 to 25 percent black, something on that order,

and black respondents indicated they would prefer to live in areas either 50-50 or slightly a majority black; is that correct?

A. That's generally correct. Yes.

Q. Haven't you also written about the strong disinclination on the part of whites to move into established black residential areas?

A. That's correct.

Q. How would you describe that – the strength of that disinclination?

A. I believe when neighborhoods reach a certain percentage minority, it may be 25, 30 percent, we find that not only do some white households continue to leave that, but the neighborhood changes as much because white households do not move into those areas. But there's a very, very small proportion of whites households that will move into neighborhoods that are heavily minority.

[p. 106] Q. So that we – is it your opinion that one would not expect, based on those surveys and your knowledge and the opinions you have expressed, that whites would move into the established black residential areas in Oklahoma City after 1950 or 1960, whatever point we want to take and look at the areas of concentrations?

A. Generally, that's correct.

Q. And does it not therefore follow that, to the extent that past discrimination was a factor in establishing concentrated minority residential areas, that those areas are unlikely to change because of the antipathy of

whites to moving in unless and until their black residents move somewhere else?

A. I think that you would have to agree with that, given what I've testified. Yes.

Q. And so to bring that down to the issue that's of concern in this case right now, the black schools serving grades one through four in the northeast quadrant of Oklahoma City are unlikely to change until all of the black families living in that area move elsewhere in Oklahoma City in your view.

A. No, that isn't what I said. I think you have to be much more complicated, much more careful when you go to shift over to schools, and you have to be careful about the kinds of neighborhood compositions you're talking about.

For example, if a number – if enough of the black families take advantage of the majority-to-minority transfer [p. 107] plan, which I think is an important part of the plan, you certainly can have blacks moving to other schools, and those schools can be reduced, and it may be that there is the possibility for developing other alternatives to try and attract whites to move to those schools voluntarily. I mean, those kinds of things can influence the school composition independent of the residential composition.

Q. Apart from those matters, as long as school attendance is determined by residential zones, such as those which have been drawn which overlay areas of established black concentration, you wouldn't anticipate white families moving into those areas?

A. I would not anticipate white families moving in. No.

* * *

[p. 111] Q. Now, Doctor Clark, if I can return to the subject of preferences, and particularly the white disinclination to move into areas of minority residential concentration.

In your view, are those preferences related to prior official discriminatory policies of governmental agencies, both to their tangible and symbolic value?

A. I would say that there is probably some effect of the past, but how much, in my opinion, –

Let me restate that.

But the amount, in my opinion, is probably small, because we see other ethnic groups, and in my own city is a good example. Of these other ethnic groups, like the Vietnamese, the Koreans, the Japanese, having quite high levels of preference for people of their own race. The Hispanics also.

So I think that these preferences are reflecting something about people's social needs, and they're not simply ascribed as the result of prior discrimination.

Q. But you don't exclude prior discrimination as a factor leading to the development of the private preferences that you've spoken and written about?

A. No, I would – I would be less than an honest academic if I didn't concede that there may be an element of that

* * *

[p. 113] When I'm using the word preference, I'm talking about people's desires for a certain combination.

Clearly, preference can also shade over into prejudice, that is, not wanting to live with some other group.

So I distinguish them, for my purposes, as saying preference is a positive function that you prefer to have a certain combination, prejudice is when you talk about not wanting something, and that's the way I distinguish the two terms.

Q. Well, when you used the term "private preference" today, particularly in response to Mr. Day's questions, did you mean to exclude from your answers, therefore, private prejudice? Were you speaking only of preference?

A. No, I think the [sic] do – when we [sic] talking about the terms, we're talking about – when I use the term preference," I include that combination of elements, preference and prejudice, but I'm not talking about private discrimination, which is something quite distinct. And, of course, even though it's private, not showing a house to a black family or another minority family is, of course, illegal, and it is discriminatory practice.

* * *

[p. 115] REDIRECT EXAMINATION

BY MR. DAY:

Q. Doctor Clark, in your opinion can a compulsory or voluntary school desegregation plan eliminate residential segregation?

A. No, it cannot.

Q. In your opinion, is there anything a public school district, standing alone, can do to eliminate residential segregation?

[p. 116] A. I don't believe so, although, when you say "anything," – but I don't believe that I've seen any instances where a school district has been able to change the residential patterns.

Q. Are you aware of any city in the United States where a compulsory or voluntary desegregation plan has brought about the elimination of residential segregation in that community?

A. I'm not aware of any.

* * *

FINIS WELCH

[p. 122] Q. Have you published any papers on the subjects of race discrimination or school desegregation?

A. Yes, I have.

Q. Would you tell us briefly about those?

A. I have published primarily empirical papers, a few theoretical papers, on race discrimination in economic outcomes. I've conducted very, very many empirical studies of income differences both between blacks and whites, between men and women, and between Hispanics and Gringoes.

Q. How about in the area of desegregation?

A. In the area of desegregation, I have just authored one study entitled "new evidence on desegregation" for the U.S. Commission on Civil Rights.

I have another paper accepted for publication in November in Sociology of Education. It's called "a reconsideration of white enrollment responses to desegregation plans."

Q. Have you qualified as an expert witness in any race discrimination or school desegregation cases?

A. Yes, I have.

Q. Would you tell us about those cases.

A. I have been qualified in various matters and have testified about 16 times where I was qualified as an expert. They have ranged most recently from a school desegregation [p. 123] case, the Little Rock School District v. Pulaski County Special District.

Before that I testified in an OFCCP case involving charges of race and sex discrimination in employment against Harris Bank.

Earlier, in the Denver School Desegregation case, on a Unitary hearing.

And so on. Very, very many employment discrimination cases.

Q. Was that the Keyes case in Denver?

A. It's the continuation of the Keyes case. Yes.

Q. I'd like to direct your attention to defendant's Exhibit 27 in the book there in front of you, and ask you if that is the study that you just mentioned that you had completed for the U.S. Commission on Civil Rights.

A. Yes, it is. I have my own copy.

Q. Would you explain to the court the scope of that study?

A. The primary intent was to establish a database that would be both current and extensive about school desegregation programs. We considered 125 school districts, including most of the largest districts in the Country, for a period spanning roughly 20 years, having enrollment data as recently as possible. We examined a total of slightly less than 300 school desegregation plans that were adopted over this period, or implemented, at least, within these districts.

* * *

[p. 127] Q. (BY MR. DAY) Doctor Welch, I'd like to direct your attention to table 13, page 51 of your study, and ask you if on that page you make some findings with respect to the state of desegregation in the Oklahoma City School District over time.

A. Yes, I do.

Q. And tell us about those findings.

A. Well, what I do, within the 125 districts considered in that table, I simply list the districts that had – that experienced the largest change between the beginning and the end of the data, the most recent data considered, in an index of the amount of racial segregation among schools in the district. The index used is the index of dissimilarity.

Q. Will you explain what the * * * dissimilarity index is?

A. It's a measure of how unevenly distributed the populations are across schools. It's a two-group index.

In this case, the index refers to whites versus people who are not white, and the idea, basically, is to say, "Given the racial composition of the school, suppose, as a hypothetical, that the school district were perfectly segregated so that no white attended school with anyone who was not white and no-one not white attended school with a white, what fraction of the population would have to be redistributed, reassigned, so that every school moved to exact racial balance?"

[p. 128] And with that as the norm, as an outer bound, then we asked, "given the existing patterns of assignments among schools, what number of students or what fraction of students would have to be reassigned such that each school has the same racial balance, the district average, and we report the second number as a fraction of the first.

So that if the dissimilarity index is zero, it means that every school in the district has the same racial composition, and if it's one, it means the district is fully segregated.

Q. So to make sure I understand, the closer the index number is to zero, the more integrated the school district?

A. Yes, the less dissimilar.

Q. The closer the index number is to the number one, the more segregated?

A. It's perfectly segregated at one. That's true.

Q. Now, in this study, did you also make use of the exposure index?

A. We did. Yes.

Q. Would you briefly explain the meaning of that index, please?

A. The Exposure Index is an alternative index of how well integrated a school system is. As is true of the Dissimilarity Index, it's a two-group comparison index, and throughout this report for the civil rights commission, the two groups were whites versus others.

[p. 129] The Exposure Index simply computes, for one group – in the case of this report, the minority group – the fraction of classmates who are white, on average, amongst all schools attended by minorities.

Now, a property of that index would be that if the schools were perfectly segregated, exposure would be zero, because the proportion of classmates who are white by a minority would be zero.

If the school system were perfectly integrated, every school had the same racial balance, then the Exposure Index would be the fraction of students district wide who are white, and if there was less than perfect integration, it would lie somewhere between the two extremes, zero at perfect integration, and the district wide percentage who are white at perfect integration.

Q. Now, did you in your study use these indices to measure the states of desegregation in the Oklahoma City School District as compared to that in the other 124 districts you analyzed?

A. We used the Dissimilarity Index primarily as a vehicle for examining school districts through time. Table 13 on page 51, as we have discussed, is one that simply takes some extreme districts and says, "which districts experienced the largest change over the – over the period of time?"

But we're not trying, typically, in this study to compare one district and say, "this district is particularly well [p. 130] Integrated while the other is not," so much as saying "what are the sources of change within districts?" And "What are the plan types that led to the sources of change?"

We do not use the exposure index very intensively in the study. What we do at the end of the study is observe – is observe that many of the indices that could have been used typically agree in their main conclusions, and we've gone primarily with the dissimilarity index.

We then state exceptional cases and count them and refer to them for some particular interest associated with the problem of resegregation that is much discussed in the literature that's associated with exodus of white students from schools moving into other districts or to private schools, and there's been a lot of discussion in the literature speculating that some of these reactions have been so violent that resegregation is actually occurring.

And what we do it divide districts into categories and say, in a limited number of cases, resegregation perhaps is an issue. We don't attempt a definitive study, but we think in most of the cases we can rule it out out of hand.

Q. I'd like to direct your attention back to table 13 on page 51 and ask you specifically what your findings were with respect to the Oklahoma City District when compared to the other 124.

A. We find that, among the 125 school districts, the Oklahoma [p. 131] City Public Schools experienced the eighth largest reduction in the index of dissimilarity, the eighth largest change in overall integration.

Q. Do I understand correctly that, out of 125 Districts, the Oklahoma City District was in the top eight with respect to the amount of change which was brought about due to the implementation of the desegregation plan?

A. Clearly, the pattern in Oklahoma City is with the implementation of the finger plan, and the amount of desegregation that was accomplished over the full period would place it eighth in the list of 125 districts that we examined.

* * *

[p. 132] Q. And over what period of time, specifically, did this study involve the Oklahoma City School District? I think we've estimated that previously, but if you could give us –

A. I did look back, and It's '68 through '82. I had data –

The data source for the Oklahoma City Schools is something known as the OCR DATA. I collected data from the Oklahoma City Schools, but they were from membership records, and gave only a two-way race breakdown of blacks versus non-blacks. And, since when

were working with a different racial breakdown, we had to go only with the OCR DATA, and, at the time this report was finished, the 1984 OCR tape had not been distributed.

Q. So that study then would not show the dissimilarity in the Oklahoma City School District after implementation of the K-4 Neighborhood School Plan in 1985.

A. It would not.

* * *

[p. 136] Q. So your projections would not include socioeconomic factors, would they?

A. To the extent that socioeconomic factors are involved in changes '72 through '86 they do, but only as they are related to the evolution of time. We do not look specifically at socioeconomic factors.

Q. Let's say, for example, a big plant moved into a certain part of the community, a big industrial plant, that brought about a change in the racial composition of the neighborhood.

You're not forecasting that sort of a thing, are you?

A. If a big plant had moved in, say, toward the end of the data in 84/85, then we would project a trend that would include a continuation of that growth.

Q. Okay.

A. We do not anticipate the arrival of plants where they have not been in the past.

Q. Okay.

A. It's a smooth evolutionary projection.

Q. These projections then are strictly based on past trends if they continue into the future?

A. That's all it is. It's just an extrapolation.

* * *

[p. 143] A. Yes. It would be between 45 and 46 percent black.

Q. And what is it presently? Do you know?

A. This year – It varies across data sources. For this data It's 39.3 percent.

MR. DAY: I will reserve offering exhibit 14 until Mr. Chachkin has the opportunity to cross-examine.

THE COURT: Very well.

Q. (BY MR. DAY) Doctor Welch, thus far we've been discussing the racial composition of the students living in the various attendance areas in this district.

In your study of the Oklahoma City System, did you also examine the numbers of black and white students enrolled in the Oklahoma City School District over time?

A. Yes, I did.

Q. Would you explain for us the scope of that study?

A. I simply looked at alternative data sources that I had, and looked both at the number of students and the race composition of students on an annual basis from 1969 forward.

Q. And what data sources did you use?

A. There were various data sources used. I used the membership records, which give membership on a school-by-school basis. These are unlike the assignment records that also show the zone of residence as we've been referring to here.

The membership records have – well, that's it.

[p. 153] These numbers are put into percentages then in the lower panel, and they show that, for example, over the period 1971 – excuse me – 1969 through 1986 that the fraction of students district-wide who are in this category that I would call "Other Minorities," moves from four to thirteen percent. The fraction of people who are black moves from 22.7 to 40 percent. The fraction of people who are white moves from 73 to 47 percent.

Q. Would you please identify exhibit number 21.

A. Okay. Exhibit 21 is something that's taken from the 1970 and 1980 census. This particular exhibit is drawn from STF-2. It's a summary tape file. That refers to a full census to a hundred percent of the respondents in the 1970 and 1980 censuses.

What we've done is identify the Oklahoma City SMSA, the metropolitan area, and the top panel refers to people of all ages. We then –

By the way, this is – the entire table, exhibit 21, refers only to the white population.

Q. Now, when you – on this table it says SMSA. What does that mean?

A. Standard metropolitan statistical area. People identified by the census as living in the greater metropolitan area in – whose central city is Oklahoma City and it's named after its central city.

* * *

[p. 173] Remember, when the dissimilarity index decreases, things are becoming more balanced. When the exposure index increases, things are becoming more balanced. They are a little different to read.

The exposure index begins at .145, so it says, "Of Students enrolled in Public Schools, that blacks live, on average, in zones where 15 percent of students enrolled and living in that zone are white as of 1972. That number has doubled by 1986 to 29.

Now, notice in 1972 about 78 percent of all the students were not black. So if we had had full balance in 1972, the average black would have lived in a zone where 78 percent of the students were not black.

By 1986, 40 percent of the students were black, 60 percent were not black. So for full balance, the average black would have lived in a zone where 60 percent of the students were not black.

So we have had this drop from roughly 80 to 60 percent of the students who are not black, and, even so, exposure – the population has decentralized in a way, so that exposure of blacks to persons who are not black in the same areas has doubled. It's gone from 14.9 percent to 29 percent.

Q. Did I understand you to say that the drop in the dissimilarity index and the gradual increase in the exposure index over this period of time shows that there was more [p. 174] balance, racial balance in these neighborhoods?

A. That's right.

* * *

RECORD, VOLUME III

RECORD, VOLUME III

FINIS WELCH

[p. 187] Now, the comparison here that's interesting is the 1985 comparison of Neighborhood Elementary Schools with a dissimilarity index of .56 versus the 1971 comparison with neighborhood schools with a dissimilarity index of .83.

And what has happened, or course, over the period, is what we were referring to at the start when we looked at exhibits 11, 12, 13, and 14. The increased residential integration of the city has resulted in a much lower level of dissimilarity today associated with neighborhood schools than was – than existed in 1971.

* * *

[p. 192] Q. In your analysis of this case, doctor Welch, did you have the opportunity to compare the degree of desegregation in the Oklahoma City School District with other comparably-sized school districts in other parts of the country?

A. Yes, I did.

Q. Briefly tell us what you did in that analysis.

A. Well, the idea was exactly as you've described it. I wanted to look at comparably-sized – not school districts so much as urban areas and to look at the central city district within them.

So what we did, Oklahoma City, in the 1986 state Metropolitan Data Book, is ranked as the 39th largest metropolitan area in the country, and so we identified that 24th through the 56th largest metropolitan areas, that

would be those smaller than and larger than, we took a total of 32, excluded Honolulu –

Q. Did you prepare a chart showing your findings?

A. Yes, I did. All I did for these districts is go to the Office Of Civil Rights Data, take the central city district, and use the most recent data I could find in the OCR data and computed the dissimilarity index, and that's in exhibit 38.

MR. DAY: Ms. Jones, would you put up Exhibit 38 for the court.

[p. 193] A. The districts are presented in rank order of the Dissimilarity Index –

THE COURT: What's the number of that exhibit?

MR. DAY: 38.

THE COURT: Okay.

A. – In rank order of the dissimilarity index, descending, with Columbus, Ohio, having the lowest degree of dissimilarity. The right-most column refers to the year in which the data are taken.

For most of the districts that's 1984, which is the most recently available OCR tape. You will noticed for Norfolk, Virginia, it's 1986. That's because Norfolk changed its plan went back to a neighborhood system recently, and the OCR data for 1984 did not capture that change. So we got membership data for Norfolk, and it's for 1986.

Otherwise, in some cases we have 1982, because the OCR '84 survey was not as extensive as '82, and some of the districts weren't covered, and in one case for Scranton, PA, they do not appear after 1978, and we had to go all the way back to that period.

In general, Oklahoma City is about the middle of the pack of the districts considered with – it has 39.3 percent black, with a dissimilarity index, as of 1986, the most recent date, of 38.9 percent.

Notice, for example, in comparison to Oklahoma City, we [p. 194] have Tulsa, which is a slightly larger school system, and it has a dissimilarity index of 54 percent from the OCR data in 1984.

Q. What does that tell you compared to Oklahoma City?

A. That black students and persons who are not black – It's a black-versus-non-black comparison – were distributed in 1986 more evenly among schools in Oklahoma City than is true in 1984 for Tulsa.

Q. Now, the data that you've used for the Oklahoma City District, do I understand correctly that that shows the dissimilarity index in this district after the neighborhood plan was implemented?

A. That's right, in the second year after implementation.

Q. Okay.

A. That is, it's the membership records as of the fall of 1986, the current academic year.

Q. So then even with the neighborhood plan in place in Oklahoma City, the students in the schools are more desegregated here than they are in Tulsa?

A. There's better racial balance here than in Tulsa.

Q. Would you –

MR. CHACHKIN: Excuse me. Your Honor, I'd like to make an objection to this line of questioning, and I am going to object to the introduction of the exhibit.

[p. 195] I think the relative dissimilarity indices in Oklahoma City and other school districts around the country is of no relevance whatsoever to the questions before this court. This case concerns Oklahoma City and whether or not a unitary school system was achieved and is being maintained, and I think the constitution and what the constitution requires depends upon the circumstances in Oklahoma City and not some comparison with a group of school districts around the country, some of which may have operated dual systems, some of which may not, and may be subject to all kinds of different legal requirements. I just don't think this has any relevance to the issues that are before the court.

THE COURT: Thank you.

Mr. Day, what's your response?

MR. DAY: Your Honor, we feel that it is relevant and that it – it will be helpful to the court to know the degree of desegregation and racial balance which has existed in the past in Oklahoma City and what exists presently in relation to other comparably-sized school districts.

I think that the objection that Mr. Chachkin has could be best addressed through his cross-examination of this witness.

THE COURT: It seems to me like it might show some parallel or relation to school boards in their operation of their school system; that is, whether or not the school board of Oklahoma City is less attentive to the problem or more [p. 196] attentive to the problem than others.

So the objection will be overruled, and you may go into depth with your cross-examination if you care to do so.

Q. (BY MR. DAY) very briefly, Doctor Welch, would you explain what's shown in each column of that Exhibit?

A. Surely. Here I have just listed the name of the Central City in the metropolitan areas. They're the names that you recognize when you think of the metropolitan areas.

Q. And how did you select those particular cities? You mentioned earlier that it was within –

A. It's described here. I think there's a slight error, actually, in this footnote. But the data source and the method of selection is described in the first footnote.

It says, "based on 1984 SMSA –" Standard Metropolitan Statistical Area "– population reported in the 1986 state and Metropolitan Data Book. It includes the 24th through –" and it says "the 55th," and it should say "the 56th" "– largest SMSA's, excluding Honolulu." Oklahoma City is ranked 39th.

Q. Well, why did you select the 24th through the 56th largest Metropolitan Area?

A. Basically, we started with the observation we wanted comparably-sized metropolitan areas, and we started with the observation that Oklahoma City was the 39th, and so we took 15 smaller and 15 larger.

* * *

[p. 216] Q. I direct your attention to defendant's exhibits number 68 through 75, doctor Welch, and ask you if, in fact, those are the school research department studies on stand-alone schools that you said that you had reviewed.

A. I reviewed all of them. I want to check, there may have been some others, as well, but I did review 68 through 75. Yes.

I have something marked as 78 which I also examined. Yes, it's 68 through 75 and then 78.

Q. All right. Now, did you analyze the attendance areas in the Oklahoma City School District in 1984 that qualified for stand-alone status by virtue of the racial composition of the area?

A. Yes, I did.

Q. Did you prepare a map demonstrating the findings in that study?

A. Yes. It's marked as Exhibit Number 88.

Q. Is Exhibit 88 the map you prepared on the stand-alone schools in '84?

A. Yes, it is.

[p. 217] Q. Would you explain that exhibit, please.

A. These are areas that we have marked attendance areas that we have marked as being eligible for stand-alone status, and all we did is to take the areas that were, for a district-wide average of 35 percent, within plus or minus fifteen percent black and identify them. The areas that are marked in this blue color had greater than 50 percent black, and, therefore, would have been uneligible – ineligible for stand-alone status.

The one area marked with white, the star area, was ineligible for being out of compliance. It would have needed to have been in compliance for two – the two most recent previous years, and was not. It was not stable racially.

The areas marked in yellow are ineligible for having too low a proportion of blacks.

And then the areas in the central color that are marked in the green color, according to our calculations, would have been eligible for stand-alone status. I believe there are twelve of them. Three were already stand-alone, and there were an additional nine areas that would have been eligible under this criterian.

The Exhibits 68 through 75 and 78 that we've talked about are really a series of memoranda that make alternative calculations that consider whether you would go – use the K-through-four stand-alones, K-through-five, the implication for [p. 218] building capacity, and what would happen under alternative rules under the JC policy for racial balance to the feeders that might be coming into

an area and where these people might possibly be reassigned. They're concerned much more with the practicalities of implementing.

This is a lot rougher and just says, on a hard-nosed view of percentages, "What is the Geographic pattern of eligibility?" and, of course, you see pretty much what you would expect, and that is the general diffusion from the Northeastern quadrant, where the black population had been concentrated, to adjacent Quadrants, and that's something that we had noted earlier with residence patterns. But you see here the eligibility for stand-alone status.

Q. And what percent black did a neighborhood attendance area have to be before it could qualify for stand-alone status?

A. It had to lie between 20 and 50 percent black.

Q. In your study, did you determine if the number of residential zones that qualified for stand-alone status in 1984 had an impact on any of the students in the district?

A. Yes, I did.

Q. Would you explain how?

A. Well, the – I mean, the main purpose, actually, of these planning documents that we've talked about and the thing that's pretty obvious is students who would have moved, particularly into the areas that were in the 25- to 30-percent black range, [p. 219] under existing assignment plans, would have had to have been bussed further into the areas out here had these eligible areas, in fact, become stand-alones.

The other thing that was a concern and you can see is that there's a real possibility that some of the Fifth-Grade Center Schools, if we had stayed under the old finger plan and just taken the schools that were eligible for stand-alone status out, some of the Fifth-Grade Center Schools that were concentrated here would at least have been pressed to close, would have fallen at least have been pressed to close, would have fallen below, in terms of enrollment, the policy guidelines for school closure.

Q. Is that because, if a school becomes a stand-alone school, it reacquires its Fifth Grade?

A. That – that was the finger plan provision, that a stand-alone school would be a K-through-Five School, and the students from that attendance area would join the busing plan at sixth grade.

Q. In your professional opinion, as of 1984, had demographic change in Oklahoma City rendered the stand-alone school feature of the Finger Plan inequitable?

A. The stand-alone feature of the Finger Plan sounds very plausible, but, in a district of this type, particularly where the fraction of students who are black is growing, as it has here – you recall that by 1984 it's much higher than it was in 1972.

[p. 219] The Finger Plan was really designed for a district that's 20 percent black. The one grade one-way busing and four grades the other way, or a ratio of four to one, assumes that the body count is four to one going the other way; that is, that there are four people who are not black for each person who are black.

By the time that we move out to the current period, where we're talking about upwards of 40 percent black, we're much closer to a ratio of one-and-a-half to one.

The provisions for stand-alones that pull out the central districts, and as we get diffusion going this way that makes below-average attendance areas eligible for stand-alone status, areas in – currently, as of 1984 – in the 20- to 35-percent range, whiplashes the remainder of the district, and forces, in principle, continuing further busing, and seems to me to be –

You know, it's just not a plan that was designed to withstand the kind of demographic change that occurred in this district. It was a fine idea in terms of racial diffusion if you work with very, very tight bounds, but then you don't need it. If you work with really tight bounds, the schools are balanced anyway, and there wouldn't have needed to have been any busing plan.

It's a funny provision, but you open this 30-percent wedge, plus or minus 15 percent, creates a lot of slack and creates a lot of inequity, and, to my mind, that, coupled with [p. 221] The fact that the overall racial composition of the district was changing, means that the plan just couldn't last, that it was really designed to fail.

Q. Did you analyze what impact the stand-alone school feature would have if it had been continued in the Finger Plan over time, say from 1986 to 1995?

A. Well, what we did, and it's plotted in exhibit 89, is take the projections that we referred to yesterday at the beginning of the testimony for the racial composition of

attendance areas in 1995, and then, using the plus/minus 15-percent rule with our projections for 1995, –

Q. Just a second.

A. – we identified the areas that looked as though they would be eligible under the projection.

And what we get is all of the areas that would have been eligible in 1984 would also have been eligible – we have star, which was almost eligible in '84. It's percentage concentration was within bounds, but it was not racially stable.

Q. Doctor Welch, let me interrupt you for just a moment and ask whether or not you projected in 1995 what the range of the racial composition of the attendance area would have to be to qualify for stand-alone status.

A. Yes, we did. There it's identified in the legend to the map, and the range it 27.3 to 57.3 percent. Again, it's a [p. 222] 30-percent range.

Q. Well, how does that range compare to 1984?

A. Well, it has slid up by 7.3 percent to allow for the trend through time in the fraction of students – the growth in the fraction of students who are black.

Q. So in 1995, under your projections, the neighborhood would have to have a higher percent of blacks living there in order to qualify for stand-alone status?

A. Yes, than in 1984. That's actually – while we piece this back together – an example –

I'll wait.

Q. Go ahead.

A. That's an example of what I would call the unintended features of the Finger Plan. The idea is that, in a district where the overall fraction of students that were black is changing, whether it's rising or falling, an attendance areas that's completely racially stable –

I thought it would be interesting?

THE COURT: Why don't we take a ten-minute recess. Court is in recess.

(A recess was had, after which the following proceedings were had.)

THE COURT: You may proceed, Mr. Day.

Q. (BY MR. DAY) Doctor Welch, again directing your attention to exhibit 89, would you explain how you did the projection of [p. 223] the zones that would qualify for stand-alone status as of 1995?

A. Well, the – excuse me. In the – back in exhibit 11, I described the projections in which we projected student enrollment, residence patterns of students enrolled, grades one through twelve, using assignment records data, and here we just plot the data from those projections.

So we're actually using grades one through twelve here, but it is the same data as was referred to in exhibit 14 where we had the map of overall residence patterns.

And what we've done here is use the same percentages underlying those zones in exhibit 14, and we have divided them into three groups, those identified with the

darker color, the blue color, would be those with above 57.3 percent black, or those that we would guess or project by 1995 would continue to be above 57 percent black. Those in the –

THE COURT: What was the – what was the figure?

THE WITNESS: It's 57.3.

THE COURT: 57?

THE WITNESS: 57. Yes.

THE COURT: All right.

A. – and those in the lightest color would be above – would be below 27.3 percent black, and those two extremes, the lightest and the darkest, would be ineligible for stand-alone status, one for not having enough people who were not black, the other for not having enough people who are black.

[p. 224] The intermediate color, the ghastly green, is our projection of areas that would be eligible for stand-alone status. And there are, let's see, I believe, six regions that would be eligible for stand-alone status, we would guess, by 1995, that are not eligible today or were not eligible in '84, and that's because of this process that we referred to many times of the continuing diffusion of the black population throughout the city.

Q. In your opinion, if the stand-alone feature was followed year by year into the future up to 1995, in the year 1995 would there be more of a busing burden being placed on the young black children?

A. There are two edges. There's the – on the one hand, as the stand-alones occur, a smaller number of students are bussed. And so, obviously, some black children who might otherwise be bussed would not be as they dropped out with the stand-alone schools. Those who would be bussed, however, would be bussed further and further distances.

What's clear, and what I hope is clear I wanted to illustrate with this map, is that the areas that are intermediate in racial concentration are the areas that are eligible for stand-alone status. They're also geographically intermediate. They lie between the areas that have too few blacks and the areas that have too many blacks in terms of the balance of the district. And since busing goes from too few to [p. 225] too many and from too many to too few, busing distances of those bussed are designed to grow. That's a feature of this plan.

Q. In your opinion, what impact would the stand-alone schools in 1995 have upon the fifth-year centers in the northeast quadrant?

A In 1984, had the stand-alones been implemented, the areas that were eligible, it would have continued to draw down the number of fifth-grade centers, and that's obviously an issue that one observes in going through the planning documents. It's something that the school board is asking about.

MR. DAY: At this time we offer defendant's exhibit 89 into evidence.

MR. CHACHKIN: Your Honor, the projections that are depicted on exhibit 89 are tied to defendant's

exhibit 11, as to which the court has reserved ruling until there is an opportunity for cross-examination. I would request the same with respect to this exhibit.

THE COURT: Very well. The court will reserve ruling until –

I did something. I don't what it was.

Very well. You may proceed.

Q. (BY MR. DAY) Have you been involved in designing and working on desegregation plans in the past, Doctor Welch?

A. Not extensively. No. I did work on the design of the [p. 226] Pulaski County Plan.

Q. In light of the 125-School-District Study that you did that was recently approved by the U.S. Commission on Civil Rights, are you familiar with the various types of desegregation techniques and plans that are being used throughout the United States?

A. I think so. Yes.

Q. Do you have a professional opinion as to whether or not the Finger Plan was designed to operate indefinitely?

A. Yes, I do.

Q. What is that opinion?

A. I think it was not. I've indicated earlier that it may have served a useful purpose at one time, but it had some inherent drawbacks. It was really designed for a racially stable school system, and it becomes very, very

clear, and, of course, as the race composition of the Oklahoma City Schools has changed, they strained the program, they stressed it, and this stand-alone feature really threatened it.

* * *

[p. 236] Okay. I think I had let you get as far as the first step, which was how you derived your projections for the district-wide racial composition in 1995. Why don't you go on from there.

A. Okay. The only thing preserved from the first step is the district-wide composition, by the way.

Step two moves within each zone and analyzes total number of students in the district within the zone, and it – and it does a trend line as step one does. All of these are trend lines, but they're just different kinds of trends or they're explaining different things.

And, again, it's time series regression that is used to forecast the number of students within each zone, of course, most have decreasing enrollment.

Step three –

Q. Let me interrupt you and just ask you to try to summarize, as briefly as you can, for the benefit of the court and the record, what you mean by time series regression.

A. The – it's a statistical procedure, but the idea, really, can be understood a bit more easily.

You take something like total enrollment in a zone, there were 88 that were analyzed in this case, and think of plotting, on a vertical axis, the number of students in

this zone and attending the Oklahoma City Schools, without regard to their [p. 237] race, and, on the horizontal axis, the years, beginning with 1974 through '86, and just plot them for the twelve – the thirteen years, '74 through '86. And now think of drawing a line through those points and then extending the line out to 1995.

And, of course, there are lots of ways to draw lines through the points, and the regression property that I was referring to has to do with the goodness-of-fit criterion that's used in selecting one line amongst many.

Q. If I understand correctly, it's a mathematical technique for shaping the line that best fits the points?

A. Subject to some constraints. It's a way of choosing the – what it does is, if in that hypothetical scatter that I've described, if you pick a single point, which would be the average over the period, the average years and the average enrollment within the zone, any line drawn through that point, regardless of whether it slopes in the opposite direction of the data or whatever direction, will have the property that if you use it to predict within the range of the data, the average projection error will be zero. You will overestimate as often as you underestimate. In fact, drawing lines the like that is a pretty good way to see just how ridiculous average errors of zero can be.

So the criterion is given that an average of zero is free. It's easy to get. What other things would we like to impose?

* * *

[p. 239] And so I checked to see, "Is there any evidence within this one zone, – " remember, we're going to do this 88 times " – that the annual percentage growth rate in attendance itself is changing through time over this thirteen-year period?"

Now, while we're getting more precise, I should say that all of these regressions are weighted toward 1986; that is, I discount the more distant past. So I use linear weights with calendar time.

So the first year, 1974, gets weight one; second year, 1975, gets a weight two; and 1986 gets a weight of thirteen. So I place a lot more credence –

What I'm trying to do is hit the end of the data. I'm more concerned with that, because I'm going to forecast from that point forward, than I am the end of the data. So I discount it with weighting logarithm.

Then I come back, and the first thing I do is I generate these two lines. Now, all this is done – is computed with computers, so I can't tell you how often these criteria matter. But I then check and say, "Let's take the recent past. Let's take 1979 to 1986. Did enrollment increase during that period, and, if so, do my two projections agree that it should have increased over that period?"

* * *

[p. 241] A. That's – that's one of the criteria, the – it was which one was consistent in projecting a sign change over the coming nine years that would have agreed with the most recent seven years. And, by "sign change," I mean if enrollment had dropped during the most recent

seven years, I wanted to project a continuing drop. If it had increased, I wanted to project a continuing increase.

Q. Well, are both of these projection methods valid methods for making population projections or demographic projections?

A. Let's think of that question two ways, okay?

One, "Is there such thing as a valid forecasting procedure?" and the answer to that's "no." I mean, there is literally no scientific basis for assuming that the world regenerates itself.

The other is "Am I aware of are you aware of a superior alternative?" and I don't think so.

"Is it state of art? Is it what people do?" Yes.

Q. Well, I don't know how you determine the meaning of the word "valid." These are –

Have you used both of these methods, and do demographers use both of these methods in making projections?

A. Routinely.

[p. 242] Q. So we have –

A. People who are doing forecasting use a variety of models, and –

Q. And so we have two different methods, and the one that is used in any given instance depends upon the results that it comes out with.

A. Of course.

Q. Okay. I think we'd gotten you to the point of describing how you came up with the projection for total attendance for each of the areas in 1995.

A. I should point out that the forecast is not just one to 1995, but it's every year, '87 – after '86, '87, '88, and so on to 1995. That gets to be important in the third step.

The third step looks at – now considers all zones simultaneously in a fairly complicated way, but what it looks at is the proportion of students who are black in that zone relative to the district-wide average, and it tries to forecast it now not as a smooth trend line. As in the first two cases, we used just trend regression. The first step for the percentage of students district-wide who are black, the second step for the total number of students in each area. The third step now –

Think of what we have built so far. We know, district-wide, the fraction of students who are black. We know how many students in each area there are. So if we add that up and [p. 243] multiply it by the district-wide fraction that's black, we know how many black students there are.

The next step is to say "where do they live?" How to allocate them among zones.

So what we do is come back over this same period and take the distribution of blacks across areas and then ask how that has changed through – through time.

And now we look for two factors, –

Q. Let me interrupt you and ask you why you decided to do that rather than simply tracing the trend in percent black in each attendance area between 1974 and

1986, the method that you used for estimating the proportion of blacks in the district as a whole and the proportion – I'm sorry – the total attendance in the future in each attendance area, and simply do another trend regression?

A. Okay, there are two reasons. The short reason, and a sufficient reason, is that the numbers would not have been consistent if I had done that. If I had used within-zone trend regressions, they would not have added to reasonable behavior at a district-wide level.

Q. I'm sorry, they would not have – the results would not have been consistent with what?

A. With district –

A property of these forecasting techniques is that if I run a linear regression on the fraction of students who are [p. 244] black in each zone; I run linear regression on the number of students who are black – or number of students in each zone; I now take the product of those two predictions; and I come back and I add up, over the 88 areas, and do a linear regression, log linear exponential growth on numbers of students; and then I do a linear regression on percentages who are black, take that product, I'll get, from that, a total number of blacks district-wide, an overall percentage district-wide. If I add up the other data, it won't agree. I'll get another percentage.

And I really didn't want an inconsistent forecast. I thought someone would be cross-examining me. And so I designed the procedure to be completely internally consistent.

Q. You mean you designed a procedure to withstand cross-examination?

A. Well, and also a straight-faced test. I wanted numbers that were going to make sense and that would be consistent.

If you start making the kinds of calculations that I'm going to put these numbers through later on, and if they're not consistent, you'll always have three or four different ways of making a calculation. And then you're always faced with the choice of explaining why you used this procedure or the other, or saying, "No, we did it every way and they agree, they disagree," And you work yourself to death. It's just a good rule to be consistent at the word go, and so you build up at [p. 245] these basic blocks so that you're sure that it is going to be consistent.

Q. Well, I understand you to be saying that you choose the method you're going to use to try to come out with the result that you want that's consistent at the end, even if that means you use different techniques for different parts of the database that you're building.

A. Well, –

Q. That is what you've done here; is that not correct?

A. Yeah, a lot of what you say is true. You choose the procedure that you want in order to be consistent, and there is no necessary inconsistency with using alternative models for different reasons. There are excellent reasons for wanting to use alternative models for different zones.

One zone, as an example, in the northeast quadrant, could have declining enrollment and smoothly declining enrollment, linear trend. Another zone in the northwest could have rapidly-increasing enrollment at an accelerating rate.

Now, you surely wouldn't want to use a model that projects increasing at the same rate in both areas, decreasing at the same rate in both areas, decreasing at an accelerating rate in one area if the other is increasing at an accelerating rate. You want to describe the data.

Q. Well, I mean, just how much confidence can one have in the outcome of these projections then when we have a moving target [p. 246] where the demographer or the mathematician or statistician chooses among methods in making the series of projections? I mean, what is the reliability of these rather exact figures that you have on the exhibit for racial composition of each attendance area in 1995?

A. That's a fair question. The – one, you have more confidence in them than you would if the demographer or the mathematician or statistician who is making the forecast had used a single and variant procedure.

Two, "How much confidence should you have? Can I put sampling errors on these numbers?" Yes, in principle I can. I did not.

"How wide are the intervals?" I can't guess, but I think it would be appropriate to call these numbers guesstimates, that I think they're straight-faced, they come from a serious procedure that's applied conscientiously, there's no result in terms of configuration that I'm

working to. I'm trying to describe the data. I think I've done that. It's as good a job as I can do in short time. I can spend longer and, I'm sure, improve the procedure.

But you certainly don't want to look at a number like .913 – or .193 and see the "3," and when you see the "9," you probably want to say .15 to .25. That's – I mean, they're an indication.

* * *

[p. 249] As I was saying before we had the question about why I used the ratio rather than the percentage, the factors used to explain that ratio were, one, the previous year's ratio, "How, in the year earlier, did this zone compare to the district-wide average in terms of percentage black?" And then we had a ratio in what I refer to as adjacent zones.

And I should say that a property of these data, and one that's not a surprising property, is that where one area has a high proportion of blacks relative to the district-wide average, one expects growth in adjacent areas, and that's part of the diffusion process that we've been describing.

So, in addition to what this area was like last year, which was always the best predictor of what it's going to be like next year, we look at what surrounding areas were like last year, and we do this by identifying what I have referred to as first and second tier neighbors.

Roughly, First tier neighbors are those that are adjacent to a given attendance area, and second tier neighbors are those that are adjacent to those that are adjacent to a given attendance area.

* * *

[p. 252] Q. Well, how is it that, if you turn the second page of exhibit – Defendant's Exhibit 11, that for zones that, for example, Dunbar, which was 97.3 percent black in 1972 and moved upward to a hundred percent black in 1986, your projection is that it will be less than 95 percent black in 1995? Intuitively the trend is in – is in the direction of going to an all-black attendance area situation.

Did you constrain – is it the influence of adjacent tiers that results in that kind of a downward projection even though the growth had been in one direction between 1974 and 1986?

A. You know, I – I would – I'm not sure. I would have to go back and – and pull out that one projection. We should have – should have done that, if you were interested, during the deposition.

It is true that in '86, Dunbar is a hundred percent black and the forecast is 95 percent black, 94.6 by 1995.

Q. As a matter of fact, all of the areas that were above 90 percent black in 1986 are projected by this method to decline, if you compare the second two columns; isn't that correct?

A. I believe so. Yes.

Q. Does that suggest to you that, particularly with respect to the zones that were a hundred percent black in student residence in 1986, that whites are going to move into those [p. 253] areas, whites with children attending the Oklahoma City Public Schools?

A. That's certainly what's in the projection.

Q. Fine. Now, Let me ask you another question, Doctor Welch.

You talked about using adjacent tiers, and this is the 1995 exhibit, but I just am using it because it shows the location of the attendance areas.

What did you use for adjacent tiers with respect to attendance areas that are at the edge of one of these portions of the Oklahoma City School District, such as Garden Oaks?

A. Uh-huh.

Q. Now, clearly, the first adjacent tier to Garden Oaks is Edwards. There's only one school zone, if I'm interpreting the map correctly, one attendance area that is, in fact, contiguous to Garden Oaks.

Would that then constitute the entire first tier or first adjacent tier?

A. I'm quite certain, yes.

Q. So –

A. We use the average composition of the adjacent tier, and it is – we do not go outside the district, so it's a within-district adjacent tier. We –

Q. So that the calculations for the attendance areas differ depending on their location in terms of the amount of data that are entered in and the way that the calculation is done?

[p. 254] A. Yes.

Q. Would that have had, conceivably, some impact on the – on the numbers?

A. Oh, I'm sure. Everything does.

Q. Now, Doctor Welch, the data and the projections that you made for Defendant's Exhibit 11 which were translated onto the map which is Defendant's Exhibit 14 and then used in the projections of dissimilarity and exposure indices on Defendant's Exhibit 40 all ultimately point toward the calculation of these indices reflective of the degree of racial balance throughout the attendance areas; is that right? That's the way in which –

A. 14 to 40. I think so that's right. Yes.

Q. Doesn't the use of adjacent areas and adjacent tiers have a tendency to round off the extremes? I mean, isn't that reflected in the projections that these zones, which have become all black by 1986, were going to decline? Doesn't that have an impact on the dissimilarity index which is supposed to take extremes into account?

A. It – there are two questions.

One, a general property of regression estimators – it has less to do with the use of adjacent tiers as to the property of the statistic in general – is that they fail to predict extremes. I mean, the better you fit the data, the more likely you are to hit an extreme, but that's a problem.

* * *

[p. 269] A. We weren't privy to the projection information. We just observed what actually happened.

Q. Did you review court documents in cases involving judicial proceedings?

A. Yes, we did.

Q. And you don't recall finding documents giving projected results on their plans.

A. We didn't use them. We didn't – that's not part of the database that we developed. It's nothing that we retained.

Q. So we can only make judgments from this exhibit about the results that are actually achieved. We really don't know anything about effort or success or anything like that in these districts from the data on these exhibits; is that correct?

A. You see the index of racial balance here, and that's all it purports to be.

* * *

[p. 280] Does this list of districts that the justice department characterizes as unitary include, in Georgia, Coweta County, C-O-W-E-T-A, Lee County, and Vidalia, V-I-D-A-L-I-A?

A. Yes.

Q. Do you know if those school systems have been held to have achieved unitary status by the federal courts?

A. No, I do not. I did not research or attempt to verify this list. I took it at face value as though it was accurate.

MR. CHACHKIN: Your Honor, I'd like to hand to the clerk a copy of an opinion of the Eleventh Circuit which I have marked for identification as Plaintiff's Exhibit 65 and of which I would request that the court take judicial notice. It's a decision in a case called Georgia

State Conference Of Branches Of NAACP versus State of Georgia, and I would direct the court's attention particularly to pages 1413 and 1414, in which the Court of Appeals states that none of the local – local defendants ever acquired unitary status through this procedure, referring to the prior paragraph in the decision, referring to holding a hearing and entering an order that a system is unitary, and going on to identify, among the local defendants, specifically, Lee County, Coweta County, and Vidalia City.

* * *

[p. 289] So is it not correct to say that this is an instance where the busing distance for some black students was increased when a school no longer was a stand-alone?

A. Yes, it is.

Q. So it really works both ways. You mentioned in your direct testimony, particularly with respect to schools that qualified for stand-alone status in 1984 and your projections for 1995, that creation of additional stand-alone schools would increase the busing distance for black students in the Northeast Quadrant.

A. As a general rule, that's right. This reassignment is pretty strange. I mean, coming from the extreme North of this Northeast Quadrant down to the South and West.

Q. Did you examine the history of stand-alone schools in the Oklahoma City School District after 1972?

A. I think so. Yes.

Q. Do you recall how many stand-alone schools there were in 1972?

A. I believe there were eleven. There were eleven.

Oops. Yes.

Q. And do you recall how many stand-alone schools there were in 1984?

A. There were three.

* * *

[p. 292] Q. And you also said this morning, I believe, that the four-to-one ratio, the grade division at the elementary school level in the original Finger Plan assumes the body count is four to one, and that by 1984 it was closer to one-and-a-half to one; is that right?

A. That's right.

Q. In your opinion, if the Finger Plan had not included the stand-alone feature in the beginning, would it have been desirable, as these changes occurred, to alter the plan to reflect those new ratios by perhaps adding a grade to the – what were then fifth-grade centers?

A. If – if one is –

There's kind of a strange balance. When people talk about the busing burden in these cases, the reference ought to be to equal numbers of people and not to equal percentages to groups, and that's the reason that I said the original Finger Plan was designed for a four-to-one system, and the system gradually moved to something that was closer to one-and-a-half to one.

If you were going to maintain steady state racial balance, if that's the objective, then, indeed, the grade relationship [p. 293] among busing should have changed.

Q. Would you have – in your opinion, would that have been a good change to make in a Finger Plan without a stand-alone feature?

A. I don't know in what sense you're defining "good". If I wanted to maintain racial balance in the school system with a minimum amount of busing, it would have been an essential ingredient.

* * *

BELINDA BISCOE

[p. 295] THE COURT: Call your next witness, Mr. Day.

Let the record show the parties are present.

MR. DAY: Our next witness is Doctor Belinda Biscoe.

THE COURT: Driscoe?

MR. DAY: Biscoe, B-I-S-C-O-E.

Belinda Biscoe, (A Black Female)

Being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. DAY:

Q. State your full name and occupation for the record.

A. My name is Belinda Biscoe. I'm an administrator for the department of support programs with the Oklahoma City Public Schools.

Q. Would you tell us about your educational background.

A. Okay. I received by [sic] Bachelors and Masters Degrees from Fisk University in Nashville, Tennessee.

After that I began on my Phd in Psychology at Vanderbilt-Peabody in Nashville, Tennessee.

* * *

[p. 302] Q. There is a pointer there in front of you, if you need it.

THE COURT: What is the exhibit?

MR. DAY: 63.

A. Okay. The exhibit that I'm looking at is a rank ordering of the elementary schools in our district. These schools have been ranked by the percent of black students that are currently attending these schools.

I think what's interesting to note here is that there are no schools –

Q. (BY MR. DAY) Excuse me. What year does that exhibit cover?

A. This year is 1985/86.

Q. Okay. Would that have been the first year that the board's 1985 assignment plan was in operation?

A. Right. This was the first year of implementation of the new assignment plan.

Q. And does this show the racial composition of the schools when the neighborhood plan was, in fact, implemented?

A. Yes, it does.

Q. All right.

A. I think probably what's most interesting to note about this is that if you look at all the racial breakdown at all of these schools, there currently, at this time, there were no schools in the district that were 90 percent white or above.

* * *

[p. 310] In addition to that, it was very important to the board to apprise the community of that option. So those of us in research sent out letters to all of the elementary parents in the district apprising them of that option, letting them know that, while the recommendation would be made to return to neighborhood schools, that anyone who wanted to opt for their same assignment under the Finger Plan could have that option.

Q. And, to your knowledge, did parents opt to exercise the majority-to-minority transfer?

A. I believe that first year of implementation of the plan we had approximately 200 students who took advantage of that option.

Q. And do parents continue to take advantage of that option today?

A. Over time what has happened is that the request for that option has decreased. There have not been as many parents this year requesting that option as there were year one of the plan.

Q. But some are still requesting it?

A. But there are some parents who still request that option.

Q. Doctor Biscoe, while you were working with the board committee during this six-month period of time, –

[p. 311] You were working with them the entire six-month period, were you not?

A. Yes. That's correct.

Q. Did you at any time observe or sense, from the actions of any of the board members, that they were in any way trying to be unfair to any minority students?

A. No, I never sensed that. I would not have been able to work with the board if I had ever felt that. That just was not the agenda. They were very concerned about equity and about the welfare of all students in the district, and that was really projected in everything they said and did when I worked with them.

Q. As a black person, did you, at any time while working with the board committee, sense that they were taking any action or considering to take any action which, in your opinion, would have been discriminatory against black students or teachers or parents?

A. No, I never felt that at any time.

Q. Did you feel that the committee was watching out for the interests of minority students, teachers, and patrons?

A. I felt that they were concerned about minority students and just all students in the district.

Q. Were any members of that committee black?

A. Yes, Doctor Clyde Muse was the – was black and was a member of that committee.

[p. 312] MR. DAY: Thank you.

CROSS-EXAMINATION

BY MR. SHAW:

Q. Doctor Biscoe, my name is Theodore Shaw. I'm one of the Lawyers representing the black school children in this litigation.

You testified that you are a member of the metropolitan fair housing board.

A. Yes, that's correct.

Q. Why did you get involved with that board?

A. Mainly because of my own concern for fairness and for people having – I feel strongly that people have a right to live where they want to live, and that if we need to tighten the laws or do whatever we have to do to insure that that happens, then I want some of my energy directed in that – to that regard.

Q. Well, to your knowledge is housing discrimination something that still occurs within the Oklahoma City Community?

A. I think housing discrimination occurs throughout this country. I don't think that Oklahoma City is unique in that regard.

A. So there's a need for a metropolitan fair housing board here?

A. Throughout this country.

Q. But I'm talking about Oklahoma City.

[p. 313] A. There's a need for one here just as there is a need for one in California or –

Q. I understand. I would agree.

Now, Doctor Biscoe, is the testing that you do only related to housing that is on the market and owned by private individuals?

A. I've only – I've been out on just a few test cases, and that was a privately-owned condominium that a couple had. But it cuts across all boundaries.

Q. Is that – would you agree then that there has been discrimination in the housing market in the past and perhaps in the present that has been perpetrated by non-private entities?

A. That's probably true. Yes.

Q. Is it your view that black people in Oklahoma City can live wherever they want to live; that is, free of housing discrimination?

A. Yes.

Q. How does that square with the notion then that housing discrimination is still a problem within the Oklahoma City area?

A. I don't think those two things are mutually exclusive, in the sense that I feel that the work, for example, that Metro Fair Housing does in this community helps to give people a fair shake.

If a person, for example, does feel that they are being [p. 314] discriminated against, there have been enough cases in the books that have been won where people have been able to finally get those housing – get that housing even if initially they have been discriminated – felt they

had been discriminated against. I just don't see those two things as – I don't think that having racial housing discrimination means that people can't live where they want to. People can. But there will always be some people discriminating.

Q. So I take it then that what you're saying is that people can live where they want to live in the Oklahoma City area because there's always the remedy of going to court, if need be, to protect their rights?

A. Yes, but I don't want to give the impression that it's a major problem. It's just – It's a problem that just exists in this country, and I don't think it's of the magnitude that it's – that the majority of the people who go out are being discriminated against, but there are some people who are.

Q. Right. Now, would you agree that people who seek housing – black people who seek housing sometimes can be discriminated against and not even realize that that discrimination has taken place?

A. Yes, I would agree with that. That does happen sometimes.

Q. And testing then is one of the methods that is used to verify that discrimination is taking place; is that correct?

A. That's correct.

[p. 315] Q. But testers are trained; isn't that correct?

A. That's correct.

Q. And their training allows them then to recognize or identify housing discrimination where someone who is not trained in the same manner may not see it?

A. That's correct.

Q. Just to make sure I understood you, you indicated that in the Nashville experience that you had –

A. Uh-huh.

Q. – in which you were a victim of housing discrimination, you were actually told that the apartment would not be available to you because of your race.

A. That's right.

Q. Is it your experience, as someone who's involved with the fair housing board here in Oklahoma City, that most people who are victims of discrimination are actually told that they will not be rented to on the basis of race?

A. Probably not. Discrimination is probably – is a lost more subtle now than it was ten years ago. So people probably find other ways to get around that without ever giving a racial motive.

Q. You indicate that the laws weren't as stringent as they were now when you wanted to pursue your claim. I was wondering which law were you referring to? Was that a local Nashville ordinance or something?

[p. 316] A. Well, I'm not sure, It's just that ten years ago there was no such thing as a metro fair housing in Nashville, and so we did our own test case. We had a friend of ours, who was white, also call this apartment

complex – well, it was a duplex – and try and rent it, and she was told it was available, that she could move into it.

At that point, the couple that did not want to rent to us became a little fearful, because I think they were starting to put two and two together, and so we called back and they used other excuses. "You have a dog. We don't want dogs here." And they went on and on. And we continued to have other people call who were white who had animals and this kind of thing, and – and they were – they said "this is fine. You may still rent."

When the representative from HUD came to Nashville from – well, he was in Atlanta. When he came to interview us in Nashville, he basically said that we did not have enough evidence, with the test cases that we had done, we had witnesses who were willing to testify. We had verbally told him that the couple had just point blank said, "you are black and you do not want to live here because there are no black people in this area," and we were told that that was just not enough evidence.

And that is what I base my statement on that the laws apparently were not a strong, because I considered that to be [p. 317] really powerful evidence. Of course, the other couple who filed the suit jointly with us had money to get their own private attorney, and they subsequently won the case. The settlement was about $1200. But it caused a lot of anguish. It was in the papers, and –

Q. sure?

A. – people almost lost their jobs. It was not a – it was a big thing for us.

Q. It's an unpleasant experience to go through.

A. Yes.

Q. Doctor Biscoe, when was the Fair Housing Board in Oklahoma City established?

A. I don't remember that date of inception.

Q. When did you first become aware of the board?

A. I have been on the Metro Fair Housing – I think this is my third year of being on the Metro Fair Housing Board.

Q. You don't have any idea whether it's ten years old, 20 years old?

A. I just cannot remember the date of inception. I hate to guess at it.

Q. What does the board do to advertise its services or, in fact, what does the board do to advertise that housing discrimination is a problem and people who are victimized can come to the board?

A. We have tried to do a lot of things. We've had posters [p. 318] made up to put on local buses here in Oklahoma City. We have fund-raiding events and go out into the community. We send out lots of information. For example, a lot of information comes to our school district, and, as a part of the school district, I have provided information on housing patterns in our district, and that sort of thing, to Metro Fair Housing prior to becoming a member of the board there.

Q. What kind of information of housing patterns are you referring to?

A. Oh, just demographic information in terms of where students are residing. They look at that and keep those data just to get a feel for whether or not realtors in the area are doing what they call steering; that is, steering people to certain areas because of racial composition.

Q. And as somebody who is employed by the school district, I'm not sure exactly – you mentioned that as somebody who is employed by the school district that you disseminate certain kinds of information, but I'm not exactly sure why you're doing that and in what capacity.

A. When I was in the research department. Of course, all of the information in that department is public information, and anybody who requests information on student population – on our student population in terms of where students are residing or anything are privileged to that information.

Q. Has it been your experience as a board member that – that [p. 319] is of the Fair Housing Board – that realtors, in fact, do disseminate information about schools when they're showing houses?

A. That is a real big drawing card. Yes.

Q. You indicate that the success rate of the Fair Housing Board in Oklahoma City is fairly high?

A. It has been. That's right.

Q. Can you tell the court or give the court an indication of the volume of cases that the board has handled?

A. I don't have those exact numbers. I know a lot of what happens in terms of volume of cases with Metro Fair Housing, of course, depends on who the staff people

are at the time and how energetic they are in terms of getting information – getting the cases tested, following through with them. Right now there's a very – a new person in that position, new staff person, and she's done a lot of work. I don't know off the bat how many cases per month we're seeing.

Q. You've indicated that the remedy for housing discrimination cases may be monetary damages and that often the people don't want the apartments by the time they're available, or the housing, even though they may have a right to it; is that correct?

A. Right. But I can't say specifically what – how that's broken out in Oklahoma City, whether or not people have still opted to secure that housing once the case is settled. I don't [p. 320] have those data available.

Q. But what may happen then is that even though someone may recover a damage award if he or she is victimized by discrimination, the segregative effect of that discrimination may still continue if he or she does not choose to take the apartment; isn't that correct?

A. It could, but I would speculate that, once people lost a case of that nature, that they'd be real hesitant to discriminate again.

Q. They might.

You indicated that there were – there wasn't enough money for the Fair Housing Board?

A. Yeah, that's true. I work with a lot of non-profit organizations here in Oklahoma City, and I think anybody who has worked with non-profits know that that's

always an ongoing battle, having enough money for operational costs and just –

Q. How was it funded?

A. A lot of it is from private donations. They do get some – some city money, I believe. But a lot of it is just private donations.

Q. But, in any event, there's enough work for the board to do so that it could use more funding; is that correct?

A. Yes.

Q. Now, you were asked about Mr. Day – or by Mr. Day, rather, about a number of exhibits, exhibits 63 and 64 and 65 [p. 321] which showed a rank ordering of schools – elementary schools by racial percentages with a projection made in exhibit number 65.

A. Yes.

Q. You also pointed out that no school in any of those exhibits was more than 90 percent white; is that correct?

A. Yes.

Q. What is the significance, in your view, of that observation?

A. Well, I think oftentimes – one of the things that happened with the Finger Plan is that we were asked to balance our schools only on the percent of black student in our district.

However, if you – since I work a lot with federal programs and attend a lot of those meetings, as I've gone

around the country one thing I've noticed that happens in many of the school districts is that people look at the percent of minority students in their district, including orientals, native American students, Hispanic students.

Of course if you look at our district in terms of total minority population as compared to white population, you get a totally different picture than if you just look at those data black-white.

* * *

[p. 327] Q. Well, can you tell the court, Doctor Biscoe, what the board has done to promote M-to-M transfers?

A. There are things that are being talked about now in terms of continuing to send out letters to apprise parents of that.

Q. Has that been done previously?

A. That did not happen this year. No.

Q. Anything else?

A. No. I have talked with Doctor Steller at length. He's been real concerned about beefing up the M&M transfers and making sure that parents know. So I do know that that's something that's been on his agenda in terms of more communication with parents regarding that.

Q. Did the board or did the administration do any study of who was exercising the M-to-M transfers in the first year?

A. I do not believe – I'm not familiar with any analyses that have been done of the M&M transfers in terms of who the people are that are requesting those transfers.

Q. Was there any analysis done with respect to the particular schools from which the transfers were being made?

A. I think those data are available. I just don't recall exactly which ones requested them. But we do have that information.

* * *

[p. 338] THE WITNESS: Yes, I do.

THE COURT: Do you think it's discriminatory in any way?

THE WITNESS: No, I do not.

THE COURT: Now, what is the faculty, black, white, *R [sic] mixed?

THE WITNESS: The faculties at all – at all the schools are mixed.

THE COURT: All schools –

THE WITNESS: Yes, sir.

THE COURT: – Throughout the whole system?

THE WITNESS: That's correct.

THE COURT: Is it your opinion that the K-4 students are too young to be bussed from school to school?

THE WITNESS: I think they are.

THE COURT: And will you tell the court why?

THE WITNESS: Kids six – from six years old until they're about eight years old, I think, are just beginning to make sound judgments. Having to walk to bus stops and then to go to parts of towns that their parents don't have access to, necessarily, during the day if they get ill, I think it just creates a stress on the family and the child.

By the time a child is ten years old, they're better able to make decisions in terms of steering clear of strangers, paying attention to street crossings, and those kinds of [p. 339] things, and I do believe they're just safer at that point in terms of having to be bussed.

THE COURT: Do you think there's any distinction in the busing of black children and white children?

THE WITNESS: No. Students are bussed equally under the new plan. All students are bussed from fifth grade on. That's regardless of race.

THE COURT: What has been the parent relation – parent-teacher relation under the operation of the 4-K – of the K-4 plan?

THE WITNESS: With the new school assignment plan?

THE COURT: Yes.

THE WITNESS: All of the data that we currently have indicates that parent involvement has increased significantly.

We now have more parent-teacher associations than we have had for years in the Oklahoma City public schools as a result of the uniting of communities, I guess is the best way to put it, and there's a lot of work continuing to go on to even – to increase those PTA associations – PTA and PTO associations throughout the district.

THE COURT: Do you see any discrimination in the 4-K plan to blacks?

THE WITNESS: No, I do not.

THE COURT: I thank you. You've been a very intelligent person.

* * *

SUSAN HERMES

[p. 347] blacks were more frequently moving into all parts of the school district boundaries.

A. Oh, yes.

Q. Are you aware of any other effort or action taken by the board of education to try to stop blacks from moving into any areas of the school district?

A. Not to my knowledge.

Q. Okay. Tell us about the curriculum, teacher assignments, special-ed courses, the availability of counselers, [sic] that sort of thing, under the neighborhood plan.

A. The board committee that was devised began with the premise that we could recommend to the full board that we stay unitary district; that we would make sure that the curriculum in all of the schools was the

same; that the staffs in all of the schools would be racially mixed; that the equipment, that the supplies would be divided equally; and we provided for a majority-to-minority transfer so that any parent who was not happy with a neighborhood situation could – would not be locked into that situation, they could have their child attend a school in which they would be in the minority.

* * *

[p. 349] Q. Now, has the board made any changes whatsoever to its assignment plan for the fifth year and up? I mean, aside from the boundary changes on the fifth-year centers.

A. Aside from boundary changes, we were not, as a committee, authorized to change anything beyond the fifth-grade level.

So, no, there were no changes in the plan and there are none today.

Q. So the tenants of the old Finger Plan, as they applied to the fifth-grade level and up, are still being followed by the board; is that right?

A. Yes. Yes, that's correct.

Q. Is the board still using compulsory busing to achieve racial balance at those grade levels?

A. Yes, that's correct.

Q. Does the board have any intent of stopping that procedure and reverting or resorting to neighborhood schools grades K through twelve?

A. No.

Q. Have you ever heard any board member suggest that?

A. No.

Q. Now, there has been testimony, Mrs. Hermes, that, as a result of the implementation of the K-4 plan, that there has [p. 350] been an increase in parental involvement.

As a member of the board of education over the past two years, have you personally – excuse me – personally witnessed any events or seen any data which indicates that there has been an increase in parental involvement?

A. Yes.

Q. Would you tell us about that?

A. Before every board meeting, the board has brought to its attention various children in these districts who have won awards and such like.

In addition to that, every new PTA unit that has formed has come to the board for recognition.

In the last two years, we have gone from 15 PTA units to nearly 50, sometimes recognizing three and four units a meeting.

So I have been personally aware of a continuous flow of units being developed.

Q. You've gone from how many? 15?

A. 15 to nearly 50, and it may be 50 by this time. It was 47 or 48 the last time I read the evidence.

Q. Would you explain to the court the purpose of the equity officer and the equity committee that was a part of this plan?

A. Yes. That goes in conjunction with what I was speaking about before, an attempt by this board to remain unitary.

* * *

[p. 354] A. Yes. I think, just as music and choir and art and PE are part of helping a middle- and high-school child become well rounded, that extracurricular activities at the elementary level, including boy scouts, girl scouts, honor choirs, brownies, and those types of activities which are held after school are helpful in allowing children to accept leadership and become more well-rounded.

Q. How about the schools in the district that were closed by the board this past year that will not be open next year? I think it's common knowledge that those schools were closed for financial reasons.

But the question I want to ask you is: how were the students attending those schools that were closed reassigned to other schools?

A. Well, I didn't actually work on the reassignment of those schools, but the children, in all the closed schools, as I recall, were assigned either of two ways.

One, where the research department divided the children among the closest schools; or, two, where the parents were brought together with the research department and asked where they wanted their children to go to school.

* * *

[p. 356] The last report that we received indicated that schools in section – in the southern part of section 4-A and B, in this area, those elementary schools need repair, and their recommendation is that we go for a bond issue as soon as possible to generate monies to fix roofs and toilets and plumbing, et cetera.

Q. How do the facilities in that area you were just describing, the southeast part of the city, compare with the school facilities in the northeast quadrant, district five?

A. Most of the schools in the northeast quadrant are in fairly good condition. There are only one or two that need as much repair as many of those in the southern sections.

Q. And it is the northeast quadrant that contains some of these schools with 90 percent or more black students?

A. Yes.

* * *

[p. 361] Q. But you would agree that it is possible that the board could change the plan in grades five through twelve in the future?

A. Say that again. I'm not sure I understood.

Q. You agree that it's possible that the board could change the plan with respect to five – from grades five to twelve in the future?

A. By law, a school board may change student reassignments. So, yes, they could change it in the future.

Q. Now, you indicated that the number of PTA units has risen from 15 to 50; is that correct?

A. Yes, That's – well, I'm not sure it's exactly 50. It's 47, 48, and then I know there are some in the process of –

[p. 369] Q. That's right.

A. Okay. and what's the end of the sentence? We could afford it?

Q. No, my question is whether the district could – yes, the district could afford the opportunity to every child within its neighborhood school scheme.

A. By our own policy, we would have to.

Q. I see. But I take it you agree that if that happened that that would mean that there would be overcrowding in some schools, some schools might not have the capacity to accept those students?

A. Well, by our own policy, we have provisions for schools that come to capacity. Then we are – the research department, or whoever is speaking with the parents, encourages the parent to choose another school in which their child would be in the minority so that we would not overcrowd any one school.

Q. Presently there are neighborhood schools which are overcrowded, are there not?

A. I don't believe there are any that are over capacity.

Q. The school district though, in order to meet capacity, is making use of portables –

A. Yes.

Q. – in a number of schools?

A. Yes, but there is still room in the portables and in the [p. 370] other rooms. So they are not at capacity even with the portables.

Q. In fact, there is one elementary school, and I'll have to look up the name, maybe you can help me, that is so overcrowded that it almost doubled its enrollment and they had to use portables? Are you familiar with that?

A. No.

Oh, Mrs. Hill is indicating Green Pastures, a fifth-year center?

Q. Yes.

A. Yes, it's located out here in Star Spencer. It was a very small elementary school, and we had no choice when planning for a fifth-year center. We wanted a centrally-located fifth-year center, and we chose Green Pastures.

And, yes, because of its very small capacity, we had to put a large number of portables on that site.

Q. And there has been discussion about building a new school?

A. A couple of years ago when we did it, yes, we talked about having to build a new school, but we're going to have to wait for a bond issue, and at this time the board has felt that the – that the – the community feeling is not such that we can pass one.

Q. That there's not enough community support for a bond issue?

A. To pass a bond issue at this point. The economy is so [p. 371] low, and the legislature is raising taxes, and it is not timely to ask for more money.

Q. In fact, the district has had to sustain a number of cuts from state aid or in state aid; isn't that correct?

A. I can't speak to the state aid specifically, but we have had six-and-a-half-million-dollars worth of cuts last school year, and six-million-dollars worth of cuts this school year alone, and we have not heard from the legislature yet if there are going to be more.

So, yes, we have received large cuts.

Q. What would happen then if the equity committee were to recommend that something had to be done to maintain equity that required a substantial expenditure of funds?

A. Well, they've already done that, which is they want us to go for a bond issue, but they – have also indicated that they realize that we have to do that on a timely, basis, because it costs us a lot of money to set up voting machines, and there's no sense in doing it if you – if you have a sense that it's not going to pass. You read your community first, and then you go for the bond issue. And the equity committee has been very understanding, because they're part of the patron group themselves.

Q. So the ability of the recommendation – the ability of the board, rather, to meet the recommendations of the equity committee is somewhat limited by the ability

of the school [p. 372] district to obtain sufficient funding in a time in which funds are rather short.

A. As it relates to major facility repair, I would agree with you.

As it relates to curriculum or staffing changes or equipment or smaller-dollar items, I would have to say "no," that we would find the money in our budget, because we have line items for equipment and curriculum and textbooks.

Q. Is one of the assumptions of the equity committee, or underlying the equity committee, that there is going to be a close in the gap of academic achievement between blacks and whites as a result of whatever measures are implemented?

A. I'm not sure that's one of their – of the equity committee's concerns. It is, however, a board concern. I'd have to look at their charts to see if it's a part of their concern.

* * *

[p. 385] Q. Well, did the subcommittee or the board direct anyone on the staff to run a simulation which would have provided for equity in terms of the burdens of transportation as distributed on black – among black and white first through fourth graders while at the same time maintaining desegregation?

A. No.

Q. Why not?

A. It was the felling of the committee that – that we were not going to bus black and white children at those early grade levels.

Q. Well, in fact, the board had been busing black children at those early [sic] for quite a while, hadn't they?

A. Yes, and it had become quite inequitable.

Q. Inequitable?

A. Yes.

Q. And one of the things the board could have done to relieve the inequity was to transport white students.

A. Well, in my opinion, that would have made two wrongs, and two wrongs don't make a right.

Q. I see. So it would be wrong to transport black and white students in equitable proportion for desegregation purposes?

A. That is my personal opinion.

* * *

[p. 390] A. Certainly. My children have been bussed up until two years ago, and they have had positive experiences.

Q. And what grades were they bussed?

A. Fifth Grade. And my son, who is in third and fourth, had to be bussed to his local neighborhood school because we lived across a hazardous street.

Q. In fact, there's a lot of busing that goes on in the school district and throughout Oklahoma for non-desegregation purposes; correct?

A. Oh, yes.

Q. And, to you knowledge, does that busing cause any psychological or educational harm to the children who are transported?

A. I don't think so.

Q. When the board adopted the plan in 1984, you were not aware of any educational basis for return to neighborhood schools, were you?

A. It was my opinion, and still is, that educational achievement would be enhanced by going back to neighborhood schools.

Q. On what did you base that?

A. I based that on my own feelings as a parent and being involved in my local PTA or PTO, knowing that I could be in school available for my children. I believe that educationally it is better for a child to have family nearby.

* * *

[p. 394] REDIRECT EXAMINATION

BY MR. DAY:

Q. Mrs. Hermes, you have been asked a lot of questions about the various elements of the 1985 student assignment plan.

I'd like to direct your attention to defendant's exhibit number 96.

MR. DAY: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (BY MR. DAY) Would you identify that exhibit, please.

A. Yes. It's entitled "Oklahoma City Public Schools Board of Education Student Assignment Plan for 1985/86."

Q. And is that the final plan that was actually implemented at the start of the 1985/86 school year?

A. Yes. That's correct.

Q. Does it set forth all of the elements of the plan and the other considerations that the board gave in formulating the plan?

A. Yes, it looks like it's rather detailed.

Q. Mr. Shaw asked you about the M-to-M transfers and the equity committee and equity officer.

Did the plan make any provisions for student interaction at these K-4 elementary schools?

A. Yes. The board decided to pair, if you will, those [p. 395] schools that were racially ten percent or more black – 90 percent or more black and ten percent or less black in such a way that teachers could bring students together among those pairings two, three, four times a year for educational activities, particularly.

Q. And was that interaction plan implemented in the 85/86 school year?

A. Yes, it was, and various schools and teachers chose to do different academic offerings.

Q. Was the interaction plan implemented this past year?

A. Yes, it was.

Q. Can you give the court just a basic idea of the type of things that the various principals may be doing?

A. Yes. I'll give you some "what if's," and then I'll give you a situation in which I was there, so that I know for sure it happened.

We were encouraging teachers to allow children to write letters to each other; to send video cassettes of themselves. We were encouraging them to have the children read the same literature; to, perhaps, bring in Artisan Residence for an art class, or maybe a musical fest, or a field day where the children would compete in races.

And, let me think, we did encourage PTA and PTO groups to have their meetings at the paired schools.

* * *

[p. 407] Q. You talked about what the board has done and how the student interaction plan has played out.

How many hours a year would students be involved in a student interaction plan?

A. About nine. Maybe twelve. Three hours for each session, three or four times a year, depending on the age of the child.

Q. Would that include the pen-pal activities, where students write to one another from various parts of the school district?

A. Not necessarily. They could be – those activities, where they would be separate, could be in addition to the hours that I mentioned earlier.

* * *

CLYDE MUSE

[p. 424] Q. Did you ever hold any offices on the board?

A. I served as Vice-President my last year on the board.

Q. During the time when you were serving on the Oklahoma City Board of Education, was a committee appointed to study the K-4 Elementary Schools and stand-alone schools in the district?

A. Yes.

Q. When was that committee appointed?

A. In July of 1984.

Q. And who was on the committee?

A. Mrs. Hill, Mrs. Hermes, and myself.

Q. And what, exactly, did the committee study?

A. We studied the neighborhood racial makeup, we studied potential busing reduction, possible boundary changes, and possible grade realignments.

Q. What was the purpose of this study?

A. To see if we could maintain, first, a unitary system, and, at the same time, see if we could then place K-4 schools in all sections, and particular [sic] the northeast section.

Also to look at the ultimate effect of the stand-alone concept and to see if we could increase pride and parental involvement, and then continue an integrated school district.

Q. What was the problem with the stand-alone school concept that prompted the appointment of this committee to study it further?

A. Whenever a neighborhood reached the racial makeup, insofar [p. 425] as student population is concerned, of the overall district average, then students could not be bussed out of that neighborhood to fifth-year centers, nor could students be bussed into that neighborhood K through four.

So that meant that the children K through four – or one through four who were bussed into a neighborhood that had acquired stand-alone status had to be reassigned, and because of the fact that the stand-alone schools generally were found in the central part of the

district, it meant that the one-through-four children had to be bussed further.

Q. Is there a map which shows this?

A. I think so.

Q. I direct your attention to defendant's Exhibit Number 210 and ask you if that's the map you were referring to.

A. Yes, it is.

Q. Okay. Go ahead with your explanation.

A. Also involved in the –

Q. Why don't you start over with the assignment of the student's under the old plan at grades one through four.

A. All right. The – the top map, I think, shows the assignments of students one through four to the schools that received them, and if you look from the northeast, which would be this section over here, you would see how the children are being bussed out. You would also see the schools that are circled in the center, which are the ones that would achieve [p. 426] stand-alone status first.

So that in order to have a student one through four attend a school for integration purposes, once the schools in the inter part of the district achieves stand-alone status, then you had to send the child further in order that he could be assigned to a one-through-four school.

The same thing is true with respect to the white fifth graders that were bussed into the fifth-year centers. Once

their district or their neighborhood achieved stand-alone status, they no longer could be bussed in.

So we had a diminishing population insofar as white students was concerned, and what that did was threaten those existing fifth-year centers – which were the only elementary schools in the black community – it threatened those schools with closing, because they could not be operated in a cost-effective fashion.

Q. Did the – how long did the committee meet? Over what period of time?

A. From July until the plan was ultimately given to the public in December, I think.

Q. During that period of time, did the committee make specific findings about its study?

A. Well, I'm not certain I understand what you mean by specifics findings.

Q. Well, did they report to the Board of Education what they [p. 427] found as a result of their study?

A. We reported to the board a comprehensive conclusion that involved what our recommendations were, but also why we did not make other kinds of recommendations.

Q. Did you report to the board on your findings with respect to K-5 stand-alone schools?

A. Yes.

Q. And specifically what did you advise the rest of the board?

A. We advised the rest of the board that the K-5 stand-alone arrangement could not continue to be a part of the plan, because what it did was took away from the board the prerogative as to how it was going to deal with and continue the educational offering in the community.

In other words, most schools that became K-4 – I mean became stand-alone, became stand-alone because of the community demanding that they become stand-alone, so that what – with some 13 potential stand-alone schools, what that did was just left the board at the mercy of a given community. Whenever they demanded it, then it had to be implemented or else we could have been accused of showing favoritism, and that would, of course, expedite the breaking down of the original arrangement.

Q. During the period of time the committee was meeting, did any members of the committee consult any government agencies [p. 428] about what they were studying and about their proposed plan?

Q. Yes, I did. I went to Dallas and consulted with the Office of Civil Rights.

Q. Why did you do that?

A. Because I was concerned about whether or not, in the matter of moving to a stand-alone status, if quotas, or if the actual ratios were upset, would this be a matter of concern for the Federal Government. And I was in formed by Mr. McClure that ultimately the government's concern had to do with equity in educational offerings and not with maintaining numbers in terms of the division of the student population.

Q. To your knowledge, was the Office of Civil Rights provided with a complete copy of the plan before the board took final on it?

A. Yes, it was.

Q. To your knowledge, was the Office of Civil Rights invited to come to these board meetings where the plan was being discussed?

A. It was.

Q. Doctor Muse, in your opinion, what are the benefits of the K-4 neighborhood plan?

A. Well, I think that, first, it provides K-4 schools in all areas, and, insofar as the Northeast Quadrant is concerned, it provides K-4 schools for the Northeast Quadrant that did not exist before.

[p. 429] It also provides for fifth-year centers in all parts of the district, as opposed to just being located in the Northeast Quadrant.

The K-4 arrangement reduces the amount of busing that's required.

It provides for an improved program arrangement, particularly with respect to the fifth-year centers, because, with a larger student body, more activities can be offered to all of the fifth-year centers as opposed to, when you have a K-5 stand-alone system, you have a smaller fifth-year grade component, and therefore can't have the kind of activities you could have with more students.

I'm convinced that the plan has increased community involvement and support.

Q. Is that – you say community involvement and support. Do you feel that it has increased black community involvement and support?

A. Yes. I think that the involvement of black patrons has increased.

* * *

[p. 431] A. Yes. There were three that preceded me. Doctor Moon, Mrs. Freddy Williams, and Mrs. Shirley Dorrough.

Q. And were each of the those individuals elected for district number five, the Northeast Quadrant of the district?

A. Yes.

Q. Doctor Muse, in light of the fact that you have a Phd in education, in your professional opinion is the board's 1985 student assignment plan, calling for neighborhood schools in grades K through four, educationally sound?

A. Yes, it is, very definitely.

Q. As a member of the black community, in your opinion does the Board's 1985 neighborhood plan discriminate against black pupils?

A. No, its does not.

Q. In your opinion, does it discriminate against black teachers?

A. No, it does not.

Q. In your opinion, does it discriminate to people living in district five?

A. No, it does not.

MR. DAY: Thank you.

CROSS-EXAMINATION

BY MR. BARBER:

* * *

[p. 432] Q. And, as I understand your concerns then, you were concerned about the diminishing school closures in the Northeast Quadrant; is that correct?

A. No, that's not correct. What I was concerned about was that the schools in the Northeast Quadrant, that the closing of them would actually be accelerated, not diminished.

Q. Okay. This was an imminent fact, was it not?

A. Yes.

Q. Schools were going to be closed.

A. Right.

Q. And what you had in the Northeast Quadrant where the fifth-year centers; is that right?

A. That's right.

Q. And you had a problem also with the Finger Plan, as I recall your position, in that it was a unilateral burden of busing.

Was that your position with the Finger Plan?

A. That the – That the major part of the busing burden, grades one through four, had to be borne by blacks.

Q. All right.

A. That was the concern.

Q. And, as I recall your position also, you were trying to find a solution to the problem of the Northeast Quadrant maybe [p. 433] waking up one morning and not having any schools.

A. Right.

Q. And you did not oppose an equal burden of busing white children as busing black children, did you? You were not opposed to that?

A. No. I think my testimony shows, Mr. Barber, that I did not and am not opposed to the equal distribution of the busing burden. At the same time, however, my testimony showed that I had some concerns about whether or not an attempt to do that would be feasible.

Q. Right. And, as a matter of fact, you didn't think that that could be done.

A. That's right.

Q. You didn't think that your Board would act on that.

A. I didn't think it had anything to do with the board. I didn't think that it would be received in the community.

Q. Okay. And when you say "received in the community," you're speaking of the white community?

A. Yes, sir.

* * *

[p. 435] Q. Your plan was passed on what, December 17th?

A. Right.

Q. Okay. Now, are you saying at that last meeting that you met with the ministers and the NAACP that you didn't promise them that you would go back to the board and try to get a continuance of the matter?

A. I never made that kind of commitment to them.

Q. Okay. So if others were to – that were there were to say that you made the commitment, that you would attempt to get a continuance, that would be in error; is that right?

A. That's absolutely correct.

Q. Okay. Now, you testified on direct examination today concerning the purpose of the current plan was to enhance pride and parental involvement; is that –

A. That's one of the purposes. Yes.

Q. Okay. What about is it not equally as important, Doctor Muse, to have pride and parental involvement throughout a child's school days, throughout from K through twelve?

A. It's important insofar as the overall outcome would be concerned. I'm not certain that the value of it is important enough to subject the children, grades one through four, to the kinds of things that they had to indure in order to have it at that early age.

* * *

JOHN FINK

[p. 495] A. I've found the document.

Q. If you would turn to page 29. Are you familiar with this document?

A. Yes.

Q. And it was prepared by the planning, research, and evaluation department?

A. Yes.

Q. Am I interpreting the information on page 29 correctly to indicate that at the time of the December, 1982, Memorandum, – that is, between the years 1978 and '84 – a portion of this Willow Brook attendance area, which has the number 477, was assigned to Willow Brook in grades one through four, and a portion was assigned to Star?

A. Correct. The portion assigned to Star was done so because of traffic hazards. Students – as I understand it or recall it.

Q. And the point of the capacity problem was that if all of those students were reassigned from Star to Willow Brook in grades one through four and other students from the Star Spencer area who might, at the time, have been assigned to Willow Brook, had to go back to the schools in their attendance areas, there would not be capacity either – somewhere. It's not clear. Either in Willow Brook or in the other schools.

A. In the other schools.

Q. Now, one – if, in fact, the stand-alone feature was an [p. 496] inflexible policy that said, "Whenever an

attendance area falls within the racial parameters plus or minus ten percent, fifteen percent, whatever it was, we must make that a stand-alone school," the capacity problem could have been solved by increasing the capacity in schools; isn't that true?

A. Capacity can be changed by adding portables, one example.

Q. So again, one of the factors that the board considered in deciding whether to make attendance areas that qualified according to the racial balance policy into stand-alone schools, was whether it would create capacity problems, and I assume what it would cost to resolve those capacity problems, and that sort of thing.

A. I have only worked with the board with the creation of one stand-alone – semi-stand-alone school, Bodine, and those were two factors which were considered.

* * *

[p. 498] Q. And am I interpreting that language correctly as a suggestion, at least on the part of the research staff, that stand-alone schools or additional stand-alone schools might be created if there were modifications to the attendance areas, to the boundaries of the attendance areas?

A. An oprion [sic] if attendance zones were added to – to the definition of the – a neighborhood, yes.

Q. Added or – attendance zones or portions of attendance zones added or subtracted, I presume.

A. Right.

Q. Were modifications made, during your tenure in the research department and to your knowledge, to attendance areas to deal with overcrowding problems?

A. Yes.

Q. Were modifications made, during your tenure in the research department and to your knowledge, to attendance areas to deal with overcrowding problems?

A. Yes.

Q. So that the suggestion here for changing attendance areas was not something totally foreign to the way in which the school system had operated?

A. Every time a reassignment was made, attendance zones or areas were altered.

Q. And could you read the following paragraph?

A. "Regarding the schools which do not qualify as stand-alone, different grade configurations, such as grades K-1, -2, and -5 at the fifth-year centers may be an option. If so, should this be considered at all fifth-year centers or only those where we would want to reassign because the membership [p. 499] would be below 200 or to improve the racial balance?"

Q. So, at least in this memorandum, the research staff suggested the possibility of adding grades to the fifth-grade centers, which at that time were all located in the Northeast Quadrant of Oklahoma City; is that correct?

A. Yes.

* * *

BETTY HILL

[p. 511] Q. (BY MR. DAY) Did any leaders in the back community [p. 512] appear that evening and state their views to the board?

A. Yes, they did.

Q. What's the name of the people that came, or the person?

A. Well, of course, we had Leonard Benton who came and spoke that evening, and he –

Q. What – just read what the board minutes say about what Leonard Benton said.

A. Okay. ? "Leonard Benton, President of the Oklahoma City Urban League, said that when the original plan was developed it was unfair in that black children had to be bussed grades one through four and white did not. He said that if we are going to have two-way busing, then students should be allowed to stay in their own neighborhoods."

MR. CHACHKIN: Excuse me, could I ask that Mrs. Hill read the last sentence again? I think you left out one word that's fairly critical.

THE WITNESS: "He said if we are not going to have two-way busing, then students should be allowed to stay in their own neighborhood."

* * *

[p. 515] Q. As an educator and a member of the board, do you have an opinion as to whether or not parental involvement has an effect on academic achievement of students?

A. Yes, I do.

Q. What is your opinion?

A. I – in fact, all the literature that we get and the magazines that we read, it does say that parental involvement is very important in a child's education.

Q. Did the Oklahoma City Board of Education take any action after you came on the board in 1976 to try to increase the level of parental involvement in the district?

A. Yes, we did. One of the things that a neighborhood school – mine I know did, Kaiser – was that for the PTA meetings, which were normally held of an evening, and it was very hard for the – for the black patrons to come from the east side, a bus was provided for them to come to those activities, and it was not a successful venture.

Q. You mean the School Board sent a bus over?

A. No, the PTA did that.

Q. The PTA sent a bus over?

[p. 516] A. Yes, to try to involve them more in the activities.

Q. And that still didn't interest them?

A. It still did not work.

Q. Did the board do anything else to try to improve parental involvement?

A. Well, I think we were constantly trying to encourage people to come, and some of our principals, too, were trying to get parents to – to help them out,

because there are many areas of volunteerism where they can help. And we just really need the parents to be a successful school system.

Q. Do you recall any occasions where the board actually would move their regular meeting – excuse me – their regularly-scheduled meetings from the administration building out into various – different parts of this community?

A. Yes. We did take our board meetings once a month or maybe once a quarter out to the various sections of Oklahoma City and hold our meetings there so that the people could come to the board meetings and have a – have a part in them if they so desired. And, there again, the attendance became so scarce from the neighborhood, and it was rather expensive for the board to go out to those areas by the time they took all of their electrical equipment and all, that we did do away with that.

* * *

[p. 518] Q. – to satisfy counsel.

What has been the result, Mrs. Hill, or all of the efforts and actions taken by the Oklahoma City Board over time to increase parental involvement?

A. I don't believe we've had any success in involving parents.

Q. Since the time that the K-4 neighborhood plan was implemented two years ago, have you, as a board member, personally observed what you feel is an increase in parental involvement?

A. Yes, I have observed a parental increase in involvement.

Q. Tell us about that.

A. Probably last year. I can give an example of two schools, [p. 519] one on the east side and one in my own neighborhood, where I was invited to a program.

And I had attended this school – had been invited to – it was to Creston Hills. And I had been invited to a program there when it was a fifth-year center. I was invited again when it was a K-4.

And I was invited to a program. It was of a morning. I went into the school, was surprised, really very shocked to see that the halls were full and the auditorium was full of people, and they kept trying to bring in chairs and bunching up. So I – to that – for that program that morning, it was a standing-room-only performance. And so the patrons – our patrons, grandparents, neighbors, had all come this this [sic] program.

Q. What was your reaction –

THE COURT: Mr. Day, let's take a recess for ten minutes.

MR. DAY: All right.

THE COURT: We'll take a ten-minute recess at this point.

(A recess was had, after which the following proceedings were had.)

THE COURT: Okay, you may proceed.

Q. (BY MR. DAY) Mrs. Hill, at the recess you were telling us about your own personal observations of increase in parental [p. 520] involvement, and you told us about an experience at Creston Hills.

A. Yes. The other school I mentioned was Kaiser, and I was invited there to a program. It was of an evening, however. And when I went to that school, there again, the auditorium was packed, standing room only. I think one of the teachers commented later that this was the first time she could ever remember when every student that attended that school was in attendance at the program, they all had a part in the program, and by neighborhood schools it meant that the children could come to the school, and if for some reason the parents couldn't come, maybe a neighbor could come with them, but then they could still walk home and be home before dark.

Q. When was that?

A. It was at the end of the first year that we had done the K-4 neighborhood schools.

* * *

[p. 526] Mr. Day may have covered this, but let me be sure I have your answer.

Would you describe the board's justification or reason for adopting the 1985 student reassignment plan and going back to neighborhood schools in grades one through four?

A. Ever since I have been on the Board, patrons have – have come before the Board, have approached me about – about their concern for busing. It's been black

and white across the deal that have said, you know, "what can we do to do away with some of the busing; have our kids closer to home?" One of the things, of course, was that they wanted the fifth-year centers closer to home. So these were the things that had been – the community had been saying to us all these years.

We were very concerned about parental involvement. There just really was none. And I really think in all the many articles I've read that we felt like that parental involvement was very important, that the parents needed to be involved in the schools, so that as we talked about home work, they – they could reinforce some of these things.

* * *

[p. 528] A. I really was addressing the next plan when I introduced that, so my answer pretty much duplicated itself.

Our patrons, our communities, had been told since '72 that, if they became integrated, they could have a neighborhood school, and they could not understand why they had followed exactly what the court had said and the board was not giving them their K-5 schools.

Q. So you're suggesting that the subcommittee felt a total moratorium on the creation of any additional stand-alone schools was not desirable because the community had been told at some prior time that stand-alone schools would be created?

A. Yes, in '72, the Court Order said that.

Q. Do you agree with Mr. Fink's responses to my questions that there was – it was not automatic that

stand-alone schools would be created, that the board had to make that decision in individual instances, taking a number of factors into account?

A. That is correct. It did have to be by board action.

* * *

[p. 530] THE WITNESS: Yes. '85.

THE COURT: 85/86?

Has that, in any way, in your opinion, diminished or destroyed, to any degree, the unitary school system?

THE WITNESS: It has not.

MR. CHACHKIN: Excuse me, Your Honor. I'm very reluctant to address the court with respect to the court's questions, but it seems to me –

THE COURT: Well, this is the question that the court's got to answer.

MR. CHACHKIN: I certainly agree with you, and I think that it is a question for the court to answer. It's a question of law. It's one of the questions that the Tenth Circuit has indicated that the court must respond to. And I don't think –

THE COURT: How could I respond to it unless I know what the evidence shows?

MR. CHACHKIN: Well, with all due respect, I don't believe that it's an appropriate legal question to ask the opinion of a lay witness, and particularly a school board member, about.

THE COURT: Well, she's had eleven years of the school board activities, and that should almost – in my opinion does make her somewhat of an expert.

* * *

MARIDYTH MCBEE

[p. 534] DIRECT EXAMINATION

BY MR. DAY:

Q. State your full name and occupation for the record.

A. Maridyth Montgomery McBee. I'm a Senior Research Associate with the Oklahoma City Public Schools.

Q. What is your educational background?

A. I have a bachelor's degree in Psychology from Oklahoma State University, I have a master's degree in student-personnel guidance counseling from Oklahoma State University, and I worked for a year on my doctrine in Educational Measurement at Oklahoma State University.

Q. And you do have a masters?

A. Yes.

Q. Ms. McBee, how long have you been employed by the Oklahoma City District?

A. I came in the fall of '78 to the planning, research and evaluation department. I have been there since '78, with the exception of 1984 when I was not employed there.

Q. What are your current duties in the research department?

A. Well, mostly I respond to questions that require data or studies concerning either evaluation or planning policy [p. 535] questions raised by the cabinet or the board.

Q. Is there any particular area in the research department that you specialize in?

A. For a time, I was the planning team leader. Right now, at my job as Senior Research Associate, I do both planning activities and evaluation activities.

Q. Has the research department prepared documents showing the retention ratios between students in the fourth and fifth grade in this district?

A. Yes.

Q. I'd like to direct your attention to exhibit 32.

MR. DAY: May I approach the witness, Your Honor, –

THE COURT: Yes.

MR. DAY: – and assist her in this.

Q. (BY MR. DAY) 32.

A. Okay.

Q. Would you identify that exhibit, please?

A. Yes. This is a document that I prepared last spring entitled "Retention Ratios From Fourth To Fifth Grade By Race."

THE COURT: What's the number of this?

THE WITNESS: It's exhibit number 32.

Q. (BY MR. DAY) And you prepared this last spring?

A. Yes.

* * *

[p. 537] THE COURT: Then let the record show exhibit 32 is received in evidence.

Q. (BY MR. DAY) Ms. McBee, as a research specialist with the Oklahoma City School District, do you see any special significance to the retention ratios in this exhibit over time?

A. It's obvious to see that the number of black students who were fourth graders and then subsequently become fifth graders is very similar. There are almost the same number in fourth grade as fifth grade.

For the others, that was the case in '71. However, since '71 we have lost substantial percent of non-black students from fourth to fifth grade until 1986 when the number – the percent retained is higher.

Q. Do you have an opinion as to why that's occurred?

A. Well, I would assume that the students that had a choice preferred not to go to the fifth-year center during the time when the numbers were going down, and now that they're not, that is no longer the case.

Q. You're saying the non- –

A. The non –

Q. – -black students that were going to the fifth-year centers?

A. Right. Right. The non-black students.

Well, maybe I should say the district was experiencing losses in the fifth grade, and we just assumed it's because the [p. 538] parents of the children chose not to send them to our schools.

Q. Have ratios been done at the other grade levels?

A. Yes.

Q. Are they as significant as these?

A. We do retention ratios every year for – for student enrollment projects.

Basically, the enrollment for our black students has been very stable. The number for the whole district, as well as the number from grade to grade, has stayed almost the same from the early 70's to present.

We have had substantial losses in our non-black population, and this is reflected from grade to grade. However, the losses is more substantial from fourth to fifth than it would be from first to second, second to third, et cetera.

Q. I'd like to direct your attention to exhibit 33. Would you identify that exhibit, please?

A. This is a five-year history. It's a bar graph that shows the number of students in fourth grade, and then the next year fifth grade, and the next year sixth grade,

and it goes from the year '75 through '77 through the year of '79 through '81.

Q. What was the data source used for that exhibit? Do you know?

A. It was the end-of-first-quarter membership report for each of the years and for each of the grades that are identified here.

* * *

[p. 540] MR. CHACHKIN: I have no objection, as long as Ms. McBee has checked the figures, as she said.

THE COURT: Very Well. Let the record show Exhibit 33 will be received in evidence.

Q. (BY MR. DAY) Do you see anything significant about the results reflected in this exhibit?

A. Well, what it shows is, from the number of students we had in fourth grade, the next year the number of students we had in fifth grade is quite a bit lower, and in some instances we gain a few students the following year in sixth grade, in some instances we do not. We maintain the loss.

MR. DAY: That's all I have. You may cross-examine.

MR. CHACHKIN: We have no questions, Your Honor.

THE COURT: No questions of this witness? You may step down.

(Witness excused)

THE COURT: Call your next witness.

MR. DAY: Mr. Vernon Moore.

Vern Moore, (a black male) being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follow:

DIRECT EXAMINATION

VERN MOORE

* * *

BY MR. DAY:

[p. 542] A. Yes. I'm on the Superintendent's Cabinet.

Q. How many people are under your supervision and control?

A. I have 26 people that I supervise.

Q. And are you also ultimately responsible for all personnel in the school district?

A. Yes.

Q. Including principals, teachers, custodians?

A. Yes. The employment and maintaining of the training opportunities for all employees in the district.

Q. And do you also participate in the interviewing and hiring of employees?

A. Yes. Our board policy requires my direct involvement at certain levels of employment. On the level of administration, I am involved.

Q. In your opinion, at this point in time is the administration integrated?

A. Yes, it is.

Q. Are there other black people besides yourself that hold upper echelon administrative positions in the district?

A. Yes.

Q. Would you give us their names and position, please?

A. Well, as I indicated, on the Superintendent's Cabinet there are three other individuals that also participate on the cabinet, and that is the Director of Middle Schools, Gloria [p. 543] Griffin, Director of Elementary Schools, Sylvia Lyon, and Doctor Betty Mason, who is the Assistant Superintendent for Instruction and Related Services that supervise those directors that I identified.

Q. What did you do in the district before 1984?

A. I was director of middle schools and fifth-year centers.

Q. And when did you first take that position?

A. I took that position in July of 1978.

Q. So as of July of '78, you would have been working out of the central office in the administration?

A. That's correct.

Q. Since that point in time, Mr. Moore, July of '78, has the administrative staff of the Oklahoma City Public Schools been integrated?

A. Yes, they have.

* * *

[p. 548] So the main aspect of the plan was to deal with the transfer of over some 500 teachers and give them some opportunity to identify places that they would like to be assigned to other teaching assignments. We felt that if we allowed them the opportunity to identify areas that they would like to be assigned to, that we would be able to hold on to what we considered to be some very good teachers in the district, and I think we were successful in accomplishing that.

Q. What does the agreement say with respect to where a teacher will be assigned or how that will be determined?

A. Well, what we – we developed what we call a profile sheet, and all the persons that had been identified for transfer were provided an opportunity to fill out the profile sheet, and on the profile sheet they could give us their preferences on where they would like to be assigned based upon the vacancies we had.

Q. What determined which teacher got to go where?

A. Well, what we first identified was first by preference and then by the length of time that the person had been in the district. We refer to that as unbroken service in the [p. 549] district.

Q. Is that also referred to as seniority?

A. Yes, sir, it is. That's correct.

Q. So, under this agreement, a teacher that had been in the school district longer had a priority choice over where he or she wished to be assigned that following year; is that right?

A. That's correct.

Q. And if that position was available, it had to be honored under the agreement?

A. That's correct.

Q. Mr. Moore, after all the dust settled and all the teacher assignments had been made pursuant to this agreement, what – what did we end up with in the Oklahoma City District with respect to faculty assignments in the school year 85/86?

A. Well, what we ended up with were people assigned to buildings that they wanted to be assigned to. More so than any – any other factor, that really was the thing that we had. Everyone that – we had over 75 percent of the persons transferred received their first choice. So that was a very good indication to us that people were assigned into a position that they wanted to – that they had chosen.

Q. What was the picture this past year?

A. As it relates to the assignments, that really didn't change that much.

* * *

[p. 552] A. The information that I compiled here is for the school year for 86/87 and then projecting it –

Q. Okay.

A. – for 87/88.

Q. All right. So you have it for the past year and projected into next year?

A. Yes. That's correct.

What we have in the schools that have been identified with 90 percent or more black students, in 86/87 we have all – the schools have six white administrators and four black administrators, and the composition next year, in 87/88, it will be seven white administrators and three black administrators.

Q. And what is the situation at the elementary schools that have a less-than-ten-percent black student population?

A. The composition for 86/87 was – it appears to be ten white administrators, one black, and two Indian.

And for 87/88, that composition changes to four black administrators, seven white administrators, and one Indian administrator.

Q. Mr. Moore, has the Board of –

Excuse me. Do you need a drink of water?

A. Yes, please.

MR. BARBER: Here you are.

THE WITNESS: Thank you, Mr. Barber.

A. The percentage that we're looking at are as a result of some of the changes. In 86/87 school year we had 28.1 overall black administrators. In 1987/88 it would have been an overall percentage of 29.2 black administrators. And this is all on the elementary level.

Q. Do I understand correctly, sir, that, although the faculties at the elementary schools are not all perfectly

racially balanced, that they do remain integrated and racially mixed?

A. That's correct.

Q. Has the Board of Education taken any recent action to address the question of racial balance amongst the faculty at the elementary schools.

A. Yes.

Q. Would you tell us about that?

A. In the meeting, I believe, on April 22nd, it was indicated that there would be some very strong building-level goals that building administrators will be held accountable for as it relates to maintaining the racial balance in the school and meeting the affirmative action goals.

* * *

[p. 555] Q. (BY MR. DAY) Would you identify that document, please.

A. Yes. This is a tentative agreement of a memorandum of understanding that was entered into by the Board and the OCFT, who is the teacher's union for the Oklahoma City Schools, dated March – excuse me – April 21st, 1987.

Q. In that agreement, what was the primary consideration that determined where a teacher from a closed school would be transferred?

A. The indication here, and this primarily addressed only transfers as opposed to '81 and '85. The idea here is to transfer teachers to meet the affirmative

action goals of the Board. We wanted to give consideration to a person's experience and time in the district, and we did that as long as the transfer did not impact the affirmative action goals of the district in a negative way.

Q. Did the Board do anything else to address the issue of teacher assignment for the coming year, aside from this agreement?

Maybe not only the Board, but you, as the Executive Director of Personnel, were you –

A. I think one of the things that happened as far as the Board, through the Superintendent's direction, that we'll all be going as a result of this language, is to make sure that the concern that – how people were assigned in '85 did not occur again. And so I think as far as influence that was indicated [p. 556] through our Board is the fact that, you know, through personnel and all other building administrators, that persons would be assigned based upon affirmative action.

Q. Since this memorandum of understanding was entered into this past spring, and based upon what you've been able to do as Executive Director of Personnel, have you prepared projections for what the composition of the faculty will be at the schools next year?

A. Yes. We have some actual assignment data that we're proceeding with, as well as development of some simulations that we think we can accomplish.

Q. We have listed as Exhibit 199 the original projected assignments, I think, that we had that you prepared probably a month or so ago.

A. Yes.

Q. And between that time and now, I take it there have been additional changes.

A. Yes, we have had some changes.

Q. We will take the appropriate action to substitute that exhibit and provide –

Do you have a copy?

Do you have a copy, Mr. Moore?

MR. CHACHKIN: I'll give this back to you.

THE WITNESS: It's in my notebook.

Q. (BY MR. DAY) Mr. Moore, is Defendant's Exhibit 199, which [p. 557] we've just had marked and handed to you, a true and correct copy of your updated projections for faculty assignments next year?

A. Yes, it is.

Q. And, without going into a lot of detail, can you just explain to the court, in general terms, where you anticipate that we will be next year on faculty assignments?

A. When we look at the elementary schools and the availability of applicants and availability of existing staff, teachers that are on non-continuing contract status for us, what we are projecting is that we'll be in compliance in almost all of the elementary schools by August of '87.

Q. And what is compliance?

A. Compliance in making reference to the Board Policy on Affirmative Action, which could be 36.9 with a ten-percent variance either way.

Q. So it would be 36-point –

A. – point-9.

Q. – point-9 plus or minus ten percent?

A. That's correct. Some schools could be at 26.9, and others could be at –

THE COURT: What are you talking about, white teachers?

THE WITNESS: No, sir. Making reference – well, it depends on how the school's identified. It could [p. 558] be white teachers, if you're talking about those schools in the –

THE COURT: Well, is this the ratio throughout the school system?

THE WITNESS: The ratio throughout the school system?

THE COURT: Yes, sir.

THE WITNESS: Yes, sir. But I'm making reference to the black teacher composition.

Q. (BY MR. DAY). The affirmative action goal; is that correct?

A. Yes, that's correct.

Q. Well, but that's at all schools, all elementary schools, is that right?

A. All schools. That's what I'm saying.

Q. All of these K-4's.

A. Yes.

Q. They'll be between plus or minus ten percent of 36.9 percent blacks; is that right, sir?

A. That's correct.

Q. And, in your professional opinion, do you think that goal will be reached by next fall?

A. Yes.

Q. Do you think there'll be any schools out of compliance?

A. Based upon what we're looking at, we think that we can accomplish that. If the –

[p. 559] Q. Have you already made these assignments, Mr. Moore, a lot of them?

A. Yes. We have made several assignments that have brought us – from the time the simulation was developed to the point where we are now.

Q. Was the closing of these seven schools an advantage to you in terms of redistributing the teachers in the district?

A. It was to a great extent, because that provided us a number of black teachers to assign to those schools that were out of compliance.

* * *

[p. 566] REDIRECT EXAMINATION

BY MR. DAY:

Q. Mr. Moore, in your opinion, has the Oklahoma City Board of Education discriminated against any minority teachers in the Oklahoma City District as a result of the implementation of the K-4 neighborhood school plan?

A. Absolutely not.

* * *

[p. 570] THE COURT: Mr. Moore, the court would like to inquire of you, from your experience, your knowledge, your education, do you have an opinion as to whether or not the Oklahoma City School District is now and has at all times since the Finger Plan operated as a unitary school system?

THE WITNESS: Yes, sir, we have.

THE COURT: What is that opinion?

THE WITNESS: Well, given the fact that we've set up the kinds of programs that are equal to everyone, all students, as it relates to the extracurricular activities, the language that we've put together any time we've had any kind of mass movement to really address the needs of all students, and they were never separated or set aside for any reason, for any indications of race.

THE COURT: Does this opinion include the K-4 program or plan that you have established for the past two years?

THE WITNESS: Yes, it does.

THE COURT: Do you have an opinion as to whether or not the dual – the unitary school system could, even if the school board wanted to, revert to a dual school system?

THE WITNESS: No, sir, I do not believe it could, primarily because of the persons and the people that are involved in the operation of that school district.

THE COURT: Very well. Any further question of this witness?

* * *

BETTY MASON

[p. 576] Q. Doctor Mason, in your professional opinion, being familiar with the plan and having been responsible for its implementation, do you believe that the plan discriminates against minority pupils?

A. I certainly do not.

Q. In your opinion, does the board's plan in any way discriminate against minority teachers?

A. No, it does not.

Q. Or minority parents?

A. No, sir.

Q. In your opinion, was the plan implemented in a non-discriminatory fashion?

A. It most certainly was.

Q. Did you insure that?

A. With everything that I possibly could. Yes, sir.

* * *

[p. 578] We require systematically that they forward that information to our offices at the end of those times. This information was compiled from that data.

Q. Have you doublechecked this exhibit to make sure that the data is correct?

A. Yes, I have.

* * *

[p. 582] In 1983/84, the membership went to 2,000. Right at 2,000.

84/85, our membership was more like 1500.

85/86, we went up to about 2500.

And 86/87, we went beyond 3,000. I believe this graph will support the data on the previous exhibit.

Q. Where was the data obtained for the years 1981 through 83/84? Do you know?

A. This information came from the State PTA.

Q. And is that the same information that's attached to the original exhibit 140?

A. Yes, it is.

Q. Okay. Would you identify exhibit 139.

A. This exhibit speaks to the number of organizations in the PTA in our district.

It shows here that in 1980/81, we had about 45 PTA units throughout the district.

In '81/82, we had about the same.

In 82/83, our PTA organizations dropped to about 30.

In 83/84, they dropped again to about 20.

In 84/85, we had approximately 15 units.

And then 85/86, we increased to approximately 30.

In 86/87 we went up to about 45, 46 units.

* * *

[p. 584] Q. And is it your opinion that the neighborhood schools are also responsible for the increased open-house attendance and parent-teacher day conference attendance?

A. I most certainly believe that. Again, many parents can walk to their school and do not have to have a second car, if you will, to get to a parent conference.

Q. In your opinion, if the neighborhood school plan is allowed to continue, will we see more of an increase in parental involvement?

A. Based on the visits that I have in my office and the conversations I've had with many community people, it is my opinion, my very strong opinion that we will see many more – many, many more parents giving volunteer service to schools and also aligning themselves with PTA organizations.

Q. Have you noticed any difference in the level of community involvement in the public schools since the neighborhood plan was implemented?

A. Yes, I certainly have, and, if I may speak –

Well, in all of our communities I have noticed an increase in community participation. Wee have the

YMCA's, the YWCA's coming to visit us, asking our support in their beginning after-school programs that they thought were somewhat prohibitive before because children were were not necessarily in the neighborhoods.

[p. 585] We have social groups – social workers coming to us wanting to get into the schools and do special kinds of things with the youngsters whom they consider to be in need of certain kinds of counseling services.

We have the prime time program which has availed itself to use to have after-school care for children.

It appears that many organizations recognize that youngsters are close at home, will be turned out of school as early as 3 o'clock in the afternoon, need something to do with their time, and they are coming up with all kinds of ideas to respond to that need.

Q. Are you familiar with the adopt-a-school program?

A. Yes.

Q. Would you explain that for the court?

A. The adopt-a-school program is a cooperative effort between our – the Oklahoma City school district and the chamber of commerce wherein many businesses are encouraged to give support to the local school district. They do that through different kinds of services.

Q. And, since the neighborhood plan was implemented, has there been an increase in community participation in the adopt-a-school program?

A. Yes, there has.

Q. In your opinion, is the neighborhood school plan in any way responsible for any part of that increase?

[p. 586] A. In my opinion, the neighborhood school plan gave a new focus, a new excitement, and a new direction to the community in relation to education, and it has caused as – just as it has caused parents and other agencies to get involved in our school, it has most certainly caused many businesses to become involved in various ways. There seems to be a new excitement about the Oklahoma City schools.

Q. I take it then you feel the plan is educationally sound?

A. I very definitely feel the plan is educationally sound. I think that the early years of a child's life are so important that we need to provide the absolutely best opportunity for our youngsters that we can.

Q. Do you believe that this neighborhood plan in any way discriminates against black students or parents?

A. No, I do not believe that.

Q. Do you believe that it discriminates against black teachers?

A. No, I do not.

* * *

RECORD, VOLUME V

[p. 609] Q. You would agree, wouldn't you, that it's possible to implement an adopt-a-school program in a desegregated school to which students are transported?

A. Yes, I would agree to that.

Q. And I take it you would also agree that majority-to-minority transfers don't do anything or haven't done anything to desegregate the schools which are located in the northeast section of Oklahoma City?

A. I would agree to that.

MR. SHAW: One moment, please.

That's all, Doctor Mason. Thank you very much.

REDIRECT EXAMINATION

BY MR. DAY:

Q. Doctor Mason, Mr. Shaw, in cross-examination, was talking with you about the decline in PTA membership in the district over time, and you said that you had an opinion as to what you believe was the reason for the decline of parental involvement in the predominantly white schools while the Finger Plan was in operation.

Would you tell us what your opinion is in that regard?

A. Recognizing that for some years now there has been a negative perception of what goes on in our schools, in spite of all the efforts that our district has

made, we suffered the [p. 610] problem of getting parents into our buildings because of that negative perception, and that crossed all color lines. This was not a situation that was peculiar to one race. And I believe that that had a direct effect on the lack of parent participation in P-T organizations all over this city.

Q. I'd like to direct your attention once again to defendant's exhibit 139, the graph that Mr. Shaw was discussing with you.

A. Okay, just a minute here.

That's right, it's not in this one. I'll have to change.

I have it.

Q. Do you have exhibit 139?

A. Yes.

Q. Mr. Shaw was questioning you about the decline in parental involvement shown on this graph starting at the 80/81 school year and continuing down until the 84/85 year.

Do you know if this decline that is noted in the 80/81 year also extends back to the 1970's?

A. Again, I have to give you the benefit of the discussions I have had with persons in the district as well as some of the readings that I have done, and they support the fact that early –

MR. SHAW: Pardon me. Your Honor, this is hearsay, and I'd like to object.

THE COURT: Overruled.

[p. 611] THE WITNESS: I'm sorry.

THE COURT: I think this is important evidence for both sides.

A. – that is prior to those years there was a tremendous amount of parent participation in P-T organizations, and my position only is that what you see here represents only from 1980, and if you were to look back further, you would find that those figures are declining figures.

Q. (BY MR. DAY) Okay. Let me direct your attention to exhibit 140, page 2. That is the letter from the president of the Oklahoma State PTA Organization –

A. Yes.

Q. – That you referred to when – while Mr. Shaw was cross-examining you.

A. Yes.

Q. Does that letter show what the PTA membership in the Oklahoma City Public Schools was as of 1969?

A. Yes, it sure does.

Q. And what was the number of units, PTA units in this school district as of 1969?

A. This letter indicates that there were 95 PTA units in our district in 1969.

Q. And what was the total membership in the PTA units?

A. 26,528.

* * *

[p. 619] The related services address all of the elements that go towards causing those things to happen smoothly within the school district, such as state reports, discipline reports, safety reports, activities of students, attendance records of students, guidance and counseling. Those are the related services that affect schools.

THE COURT: Big job.

Does this entail the entire school system from north to southeast to west?

THE WITNESS: Yes, it does. It entails the entire school district preschool through twelfth grade?

THE COURT: Are you familiar with the order this court made in January, 1977, that the Oklahoma City School system had become unitary?

THE WITNESS: I am familiar with that.

THE COURT: The court will – or do you have an opinion as to whether or not, from your job and your services, your experience and your knowledge, has operated a unitary school system in Oklahoma City at all times since January, '77?

MR. SHAW: Pardon me. Your Honor, again, like my co-counsel, I'm hesitant to object to the court's question, but it calls for a legal opinion which this witness is not qualified to render.

* * *

[p. 625] Now, exhibit 138 and exhibit 139 are simply graphs that show what's in exhibit 140 and the pages attached to it from the state organization. We believe it's

reliable, accurate, and extremely relevant to these proceedings.

MR. SHAW: Your Honor, if I may respond.

THE COURT: Yes.

MR. SHAW: With respect to exhibit 140, although there are open-house figures that the district provided, then the district can substitute another exhibit which contains those figures.

With respect to the State PTA Organization, that is a private entity. The question is not whether they have reasons to inflate or deflate their figures, the question is whether we can know for sure that the figures are accurate, the witness has testified she did not know, and an adequate base has not been laid for the admission of that exhibit, which, therefore, makes the charts also possibly unreliable.

THE COURT: The court will take your objection into consideration. They are in evidence, but you have raised a question as to the authenticity of the exhibits, and the court will consider your objections.

* * *

ALONZO OWENS, JR.

[p. 629] A. I didn't like it.

Q. Why didn't you like it?

A. Because I wanted my child in my neighborhood. That's where I went.

My child was also asthmatic, and she, from occasions – on occasions, had problems. The first time she had a problem, I didn't know where Hawthorne was located,

and it was – it became a serious matter with us, but there was nothing we could do about it.

Q. You felt that if she was at a neighborhood school closer to home that you would have control over the situation?

A. I knew we would have. Yes.

Q. After the neighborhood plan was adopted and –

What grade did your daughter attend, the first year after the plan?

A. Fifth-year center.

Q. Fifth-year center?

A. Yes.

Q. That would have been at Page Woodson?

A. That's right.

Q. Which was close to home; right?

A. Yes.

Q. Okay. As a black parent from the northeast quadrant, do you continue to support the neighborhood plan today?

[p. 630] A. Yes.

Q. Have you noted any increases in parental involvement, participation of parents at school activities since this plan was implemented?

A. Yes.

Q. Can you give us a couple of examples of the type of things you've seen?

A. I have a sister who lives in my neighborhood who has grandchildren, and now that the children are in neighborhood school, her participation has increased. She attends meetings, and so does the child's mother. Prior to that – prior to that, there was no way they could have, work schedule and a whole bunch of other things. They just didn't do it.

* * *

TOMMY B. WHITE

[p. 639] Q. Were there any other reasons that you were in favor of the plan?

A. Well, I liked the idea that they were going to have an equity committee that would assure – act as an oversight committee and would assure us that – of equality and equity within the education of our children and within the school itself and the environment in which our kids found themselves.

Q. At that point in time, did you have a view or an opinion with regard to busing young children grades one through four?

A. I did, and that's one of the reasons that – that I was very strongly in favor of this plan, because I preferred my kids not to be bussed.

Q. When this plan was being proposed by the board, did you view it as being discriminatory against blacks?

A. No, sir, I did not.

Q. And, Doctor White, during the period of time when the board of education was considering the plan and holding the town meetings, discussing the plan with

patrons in the community, did you formulate an organization of parents?

A. I did formulate a group of not only parents but ministers and educators, doctors, and those who were interested in the welfare of our children.

Q. And what was the name of that organization?

[p. 640] A. It was Coalition of Equity – of Excellence and Equity –

Let me – may I refer to my notes, please?

Q. Oh, certainly.

A. Coalition for Equity and Excellence in Education. The acronym was CEEE.

Q. That would be C-E-E?

A. C-E-E-E.

Q. What was the primary purpose of that organization?

A. The purpose of the organization was to promote, as its name implied, equity and excellence in education in the schools within the northeast quadrant, and –

Q. Did that organization –

Well, let me ask you this: were you the chair of that organization?

A. I was what was know as the convenor.

Q. The convenor?

A. Yes, sir.

Q. Could you tell the court the opinion of the Coalition for Equity and Excellence in Education of the neighborhood plan?

A. They fully endorsed it, fully endorsed the proposed plan, at that time proposed plan.

Q. Did the Coalition of Excellence and Equity in Education conduct or undertake a survey in the northeast quadrant concerning patron and parental views on this neighborhood plan?

[p. 641] A. Exactly. We did that.

Q. Could you give us the approximate point in time when that survey was conducted?

A. If I can refer to my notes.

Q. Certainly.

A. Approximate time was around December – the months of December and January of 19- – December, '84, and January, '85.

Q. Doctor White, when you testified before this court in April of 1985, as I recall at that time a survey had not been completed; is that –

A. That's correct.

Q. Was it ever completed?

A. There were other people that signed the petition. But, to be complete, no, not in the terms that we wanted it to be complete.

Q. How many people in the northeast quadrant were actually interviewed, approximately?

A. Approximately? Close to 400.

Q. And have you analyzed their responses?

A. Yes, sir.

Q. What was the question on the petition that was circulated?

A. The petition – may I read the petition?

Q. Certainly.

A. The petition was that – because we would interview the people individually, one on one, discuss the plan as we [p. 642] understood it, let them read our fact sheets, and then the petition read like this:

"We, the undersigned, being patrons, past patrons, and friends of the Oklahoma City School District, do hereby endorse and support the new student reassignment plan for grades K through four as long as our children receive the quality of education we desire, and;

"Number one. Elementary schools re-establish in the black community K through four;

"Two. District-wide desegregation to begin for all students, grades five through twelve;

"Three. Quality teachers, both black and white, specifically grades K through four.

"Our endorsement is based upon the fact that the plan will reduce the inequitable busing burden on all children, especially black children, in the northeast quadrant, and maintain elementary schools within the northeast quadrant."

Q. Now, did you supervise how that petition was circulated?

A. Yes, sir.

Q. Do you have the – all the signatures there on the document?

A. Yes, sir. And then, I might add, that there were – there were some more signatures to come, but one of the petitioners is no longer with us, so it's difficult to get that.

Q. Well, do I understand you correctly, Doctor White, that [p. 643] 400 black patrons in the northeast quadrant of the district signed the petition to support the concept that's stated on its face?

A. Approximately 400 did and accepted the – the – as I've stated on the face.

Q. At the time the CEEE Coalition was in operation, did you have a view or an opinion as to whether or not a neighborhood school plan, grades K through four, would cause an increase in parental involvement in the schools?

A. Very much so. We felt that very much so. In fact, that's what was lacking. I sent my school – my kids to a neighborhood school, and the neighborhood school happened to be a private school, and, basically, it was because we could have involvement within the school, because our kids, the way the plan was set up, would have to attend a school in Roosevelt, which was a great distance from our home and from our community.

* * *

[p. 650] Q. When we talk about busing in a pejorative sense, would it also be correct to assume that we are talking about busing for desegregation purposes?

A. I'm not against –

Let me say something, if I may. I'm not against busing at levels five and above. I'm against busing K through four, period. Those are formative years, children are young, and that's what I'd like to deal with, because that's what our [p. 651] coalition dealt with.

* * *

[p. 678] REDIRECT EXAMINATION

BY MR. DAY:

Q. Doctor White, Mr. Shaw examined you about the existence of some predominantly black schools in the northeast quadrant.

Is it your understanding under the neighborhood plan that where a child goes to school in Oklahoma City is based on where that child lives?

A. Yes, sir.

Q. As of this time, are you aware of the extent that black people have elected to live in other parts of the Oklahoma City District aside from the northeast quadrant?

A. I'm acutely aware.

Q. In your opinion, sir, are there any governmental barriers today which compel blacks to live in the northeast quadrant?

A. None whatsoever.

Q. So those people are free to move and go to school where they want; isn't that true?

A. Exactly.

Q. And the CEEE Organization, at the time they supported this plan, was aware of the majority-to-minority transfer option that the board was offering; isn't that true?

A. I believe that to be true, sir.

[p. 679] Q. And did you understand under that option that the parent of any child who is attending a school where the child's race was in the majority had a chance to transfer to a school where the child's race would be in the minority?

A. We were very aware of that.

Q. And that the board of education would pay for the transportation?

A. I'm aware of that.

Q. In light of these factors, doctor, in your professional opinion does the board's K-4 neighborhood plan discriminate against any black students in this district?

A. Not in my opinion, sir, at all.

Q. In your opinion, does it discriminate against any black parents?

A. In my opinion, it does not.

Q. In your opinion does it discriminate in any way against anybody?

A. Not in my opinion.

Q. Notwithstanding the question from Mr. Shaw about the methods that you used in circulating this position – petition, is it your professional opinion that the results stated in this petition is reliable?

A. Yes.

Q. Are reliable?

A. Yes, sir.

* * *

[p. 681] MR. DAY: Thank you, Your Honor.

Nothing further.

THE COURT: All right. Any further question of this witness?

MR. SHAW: No, Your Honor.

THE COURT: Are you familiar with the – do you have an opinion as to whether or not, under the Finger Plan, the Oklahoma City School District became a unitary school system? Do you have an opinion?

THE WITNESS: No, sir, I do not, sir.

THE COURT: All right.

MR. SHAW: Objection, Your Honor. That draws a legal conclusion?

THE COURT: He has no opinion.

You may step down.

* * *

CAROLYN HUGHES

[p. 682] Carolyn Sue Hughes, (a white female) being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. DAY:

Q. Doctor Hughes, would you state your full name for the record?

A. Carolyn Sue Hughes.

Q. What is you occupation?

A. I'm Assistant Superintendent for curriculum and program development at the Oklahoma City Public Schools.

Q. When were you first employed by the Oklahoma City School District?

A. In July of 1986.

Q. What is your education background?

A. I have a bachelor's degree from Miami University in Ohio, a master's degree from Miami University in Ohio, and a PHD from Kent State University, also in Ohio.

Q. What are your duties and responsibilities in your present position with the school district?

A. My responsibilities are basically to insure that adequate attention is given to the planning and delivery of curriculum.

* * *

[p. 685] The criteria I set was that I wanted to work in an urban district, I wanted some responsibility for curriculum, and I wanted to be in a district where there were a significant number of minority children.

The reason for that was perhaps a little selfish, because I'm convinced that the quality of life that my grandchildren will have will be heavily impacted by how well we educate minority youngsters.

Q. Are you familiar with the effective schools concept?

A. Yes, I am.

Q. Before you came to the Oklahoma City District, what did you know about effective schools?

A. Probably my first contacts with it go back to the early 80's when, as part of the association for supervision in curriculum development program, I had direct contact with Ron Edmonds and Larry Payzant, both of whom are researchers in the field, Edmond no longer among the living but having made a major impact. I knew that from his research we could do a far better job than many schools are doing in the education of minority youngsters, the basis of that research being that there do exist schools in which there is a high degree of achievement for both majority and minority youngsters, for both affluent and less affluent students. I knew that the correlates of effective schools included instructional leadership on the part of the Principal, the safe and orderly [p. 686] learning environment, a strong instructional focus, high expectations for all students, and measurement or the

ability to monitor students' achievement and report those.

Q. After you arrived and started working in the Oklahoma City District, did you find that they had an effective schools program?

A. I was delighted at what I found.

Q. Tell us what you found.

A. The wheels had been – the wheels had been set in motion to do a broad range of staff development for teachers and administrators throughout the Oklahoma City Public School District. That particular program that had been adopted is one that focused on the very correlates of effective instruction that I mentioned earlier, and means had already begun to train a district-level cadre whose task it was to train the teachers in every – in every building in being able to do a better job of instructing students effectively.

Q. What aspects of an effective schools program are most relevant to curriculum development?

A. Probably the ones that are most important are instructional focus. That's probably at the top of the list. Secondly, the monitoring or measurement of achievement. And third, the establishment of high expectations.

Q. As assistant superintendent in the district over curriculum and instruction, where is the Oklahoma City School [p. 687] district headed in the future in this area?

A. Well, we have made some progress even this year, I believe. One of the things that we have done in

clarifying our instructional focus has its strongest impact on kindergarten through fifth grade.

What we've done there is to establish, for every single grade level, a set of grade-level essential skills, and we have directed and helped to train teachers across the district in making certain that every student in the particular grade level is given direct instruction in the skills of that grade level.

That has not been, across the country, generally true, but we find, as we look at the research and as we see what people in other major school districts are doing that works, that if we clarify what the expectations are, what the skills are that students are to learn, we make sure parents and students and teachers and administrators all understand those, we're much more likely to make progress.

We're in the process this summer of fine tuning our monitoring system so that we'll be able to report to teachers, students, parents, each student's progress toward these.

Q. Does the research show that an effective schools program can enhance or improve academic achievement?

A. Absolutely.

Q. Tell us a little bit about that.

A. Well, one of the significant research studies, I believe, [p. 688] this year, has been – that has been reported this year was conducted in the state of Washington, and there, when effective school procedures were put in place, there were extremely significant gains on the

part of students in their achievement, and those gains were the strongest among poor and minority students.

In general across the country, we experienced disproportionality in achievement based on socioeconomic and racial differences. Where effective schools are being put in place, those differences are being narrowed.

Q. Across the Oklahoma City School District, is there a uniform curriculum provided at all grade levels?

A. Yes, there is.

* * *

[p. 691] In addition to that, this year, as part of our effective schools thrust, we have done what's called the disaggregation of test data.

Q. What does that allow you to accomplish?

A. Well, the disaggregation of test data is something that's been strongly recommended by some of the urban educators and curriculum leaders across the country. It's a risky thing to do, I might say, because it recognizes that, across the country, there's a disproportionality in achievement by race and socioeconomic level and gender.

Q. So this allows you to concentrate on that gap?

A. This enables us to, one, identify and face up to the gap, and then concentrate on reducing the gap.

Q. In your opinion, will the effective schools program that has been implemented in the Oklahoma City District have the effect of closing the gap between black-white achievement?

A. It's my opinion that that's true * * *

* * *

[p. 693] Q. If this court were to order the operation of the Oklahoma City Public Schools in such a fashion as to desegregate grades one through four in all schools, could you oppose – I mean, I'm sorry – could you impose a plan which would utilize effective schools techniques?

A. Yes.

[p. 695] THE WITNESS: Judgment from what I have seen in this district since I have arrived, and what I've learned about it, we do not have a dual system. Whether or not the Finger –

THE COURT: I wasn't – I hadn't got to that.

THE WITNESS: I'm sorry. I thought that was what you were asking me.

THE COURT: Well, I'd asked you if you're familiar with it, the knowledge of it.

THE WITNESS: Yes, I am.

THE COURT: Do you have an opinion?

THE WITNESS: Yes, sir.

MR. SHAW: Pardon me, Your Honor, may I just take a running objection to –

THE COURT: Yes.

MR. SHAW: – Any questions of this kind –

THE COURT: Yes.

MR. SHAW: – to fact witnesses?

THE COURT: You may.

THE COURT: What is that opinion with reference to whether or not it resulted in a continued dual school system or unitary system?

THE WITNESS: It is my opinion that we do not have a dual system.

* * *

[p. 697] Q. * * * The cost of the imposition of a busing plan could affect the ability of the school district to implement an effective schools program; is that correct?

A. Yes, sir. Yes, sir.

Q. In fact, it would be true that any costs which resulted in substantial outlays of funds could impact upon the school district's ability to provide effective schools programs, couldn't it?

A. Yes, sir.

* * *

ARTHUR WAYNE STELLER

[p. 702] Q. You mentioned effective schools. There's been testimony in this case that there is an effective schools program being implemented in the Oklahoma City District.

Would you briefly describe that program for us and tell us, in your opinion, where this school district is headed in the future with that program?

A. Well, there are five basic correlates to the effective schools program. It's based on, really, the premise that all children can learn, regardless of any disadvantage which they may bring to school.

The first premise – well, it depends on your preference on which you give first, but one of the correlates is that a principal is the instructional leader at his school.

Another one is that there needs to be a positive school climate in each school.

Another correlate is that there should be an instructional focus in the school, concentration on academics.

Another one of the correlates is that you monitor student achievement periodically through standardized tests and other ways to make * * * sure that you know exactly how the student's performing at all times.

And the fifth one is high expectations for students.

Q. Does the research show that an effective schools program [p. 703] can increase academic performance?

A. Very much so. Ron Edmonds, a black scholar, was considered to be the founder of the effective school movement, and he's done extensive research on that. That research has been replicated by others, like Larry Lazod from Michigan, and various other researchers, which has all demonstrated that effective schools can improve the academic achievement of students, and it can also lower the gap and close the gap between black students and white students, or any other minorities or socioeconomic levels, and also gender levels.

Q. How long had the effective schools program been in operation in the Oklahoma City District?

A. Well, we started some things actually last year. But, in terms of meaning – when I say last year, 1985/86. But in terms of really being a full-fledged program that

was up and running, it would be in this past school year, the 86/87 school year.

Q. And have you received any results that would indicate how the program is working?

A. Well, if we simply look at our test scores, we can correlate our test scores to the number of staff members in the various schools who took advantage of the program and completed the instructional effectiveness training program. There is a definite correlation between the number of staff that completed the program and the test scores in those schools.

* * *

[p. 705] Q. Doctor Steller, are you familiar with any of the busing distances involved in Oklahoma City under the old Finger Plan, let's say, from the schools – let's start with schools that are 90 percent or more black – and the schools they were paired or clustered with?

[A]. I really don't have the information on exactly the time and distance factors in the old Finger Plan. I have a general notion. And, looking at a map, I know approximately what the distance would be, but I can't give you the exact numbers.

Q. Can you give the court some examples of those distances?

A. Well, I could in terms of a – I made a few examples of what they would be if we looked, not necessarily under the Finger Plan, but we looked – if we looked at the schools right now that are 90 percent or more black to schools that are less than ten percent black, and some of the examples would be – these are not exact,

because they are not routing distances. They're simply mileage. And the routing distances of a school bus to go from one place to another is always going to be higher than the distances I will give here.

Q. Well, how did you compute the distances that you're going to give?

A. Mileage in terms of the most direct route by a car, by an automobile, for one staff member to go to another school. But that – a school bus obviously is going to take a different route.

* * *

[p. 716] Q. Do you have an opinion as to whether or not the board's 1985 K-4 Neighborhood Plan has had the effect of increasing community involvement in the schools in Oklahoma City?

A. Yes, I do.

Q. What is that opinion?

A. That from every indication that you want to look at, there's much more community involvement in the schools than there had been before, and that the sport is out there in terms of the community for the school system.

* * *

[p. 727] A. Okay, the schools that are predominantly black, and that's the very bottom of that column, and that cost is $1,562 per student. So the cost of the schools that are 90 percent or more black is $10 – averages $10 per student more than the cost of the schools where there are ten percent or less black students.

* * *

Q. In your opinion, are the funds allocated per student at the various schools throughout the district in any way discriminatory against minority people?

A. Not at all.

* * *

[p. 736] Q. * * * Do you have an opinion, based upon your educational background and your experience, as to whether or not parental involvement is essential to positive academic achievement?

A. Very much so. We talked earlier about community support for bond issues and financial, but the same thing is true in terms of academic achievement in terms of students, in my opinion.

Q. Do you have an opinion as to whether or not the increase in parental involvement that has been experienced in this district over the past two years is related to the K-4 Neighborhood Plan?

A. Well, definitely. I think the district had made attempts [p. 737] and had tried to continue to promote and retain parental involvement through the number of PTA organizations, through membership, through a variety of other things, and yet it had steadily declined.

With the return of the neighborhood schools, people were much more willing to participate in PTA meetings, they were much more willing to come to parent conferences, open houses, and other things such as that.

Q. In your opinion, if the Neighborhood Plan is allowed to continue in operation, will we see additional increases in parental involvement?

A. Definitely. And I think it's one thing that when you look at the various numbers, you know, part of the problem that the state PTA has had is to keep up with our growth, because we're growing so quickly. The number used in exhibit 140 says that we have 42 PTA's. Well, the exhibit was done earlier this spring, and we now have over 50. So it's continuing to grow at that kind of a rate.

The memberships also continue to increase, and I would predict that within a year, by this time next year, that all the schools would have a PTA, and that membership in every school would be increased, as well.

Q. Speaking or exhibit 140, is that the one where the state department or the state PTA data is attached?

A. Yes, that's correct.

* * *

[p. 742] MR. CHACHKIN: I'm not going to ask the witness anything further, Your Honor, but, again, I would respectfully move that the exhibit should be stricken. It is hearsay, and there's no adequate foundation for it.

THE COURT: I think his explanation is sound enough to justify its admission.

* * *

[p. 744] Q. And so it is – the exhibit does not represent a comparison of the performance of the same group of students from one year to the next.

A. That – that is correct. We could do that, and I think you would find, really, the same – the same reduction of gap.

Q. Well, you couldn't do it for the metropolitan achievement test, because it hadn't been given in the second grade up until this point.

A. No, we could go third-grade/fourth-grade, however.

Q. I'm sorry, my understanding was that it was only administered in the third, seventh and tenth?

A. In 1985/86, it was administered in three, seven, and ten, but in 1986/87, we could compare the same third graders with the same fourth graders.

Q. But that's not what this exhibit does.

A. No, it does not.

Q. It doesn't really show the change in gap of performance, if you want to put it that way, looking at the same group of students.

A. It does not compare the same group of students. It compares the same grade level, and that's an accepted technique.

* * *

KAREN FRANCIS LEVERIDGE

[p. 775] Q. What is your opinion?

A. I think it's, without a doubt, probably – probably one of the major reasons for that increase and for that stability coming back.

Q. Have you personally observed this increase yourself –

A. Yes, I have.

Q. – Throughout the community?

A. Yes.

Q. Can you share with us a few of the incidents that you have observed?

A. Well, I have stayed very active in PTA, though not an officer on the state level or any other level at this time. I have moved on from that involvement. But I work very closely with the state PTA organization through the Oklahoma coalition for public education and other education organizations, as well as work with the legislature.

I also do have three grandchildren who will be in the Oklahoma City School District next year and two this past year and have kept very involved and very informed of their activities and what's happening within their PTA at Sequoyah School.

* * *

ODETTE M. SCOBEY

[p. 785] Odette M. Scobey, (A black female)

being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

* * *

Q. Would you state your name for the record, please.

A. My name is Odette M. Scobey.

Q. And where are you employed?

A. I'm employed presently at the Truman – well, in between the Truman Elementary School and Dunbar Elementary School.

Q. Are you employed by the Oklahoma City Public School District?

A. Yes, I'm employed by the Oklahoma City Public Schools.

* * *

[p. 788] Q. In your visits to other buildings and in communication with other principals, do you feel that, in any way, Truman was discriminated against or afforded any different treatment than any of those other district schools?

A. I cannot say that I have observed that to be true.

Q. Did you have adequate supplies at Truman?

A. Yes. We have been able to acquire adequate supplies.

I would like to explain that. The first two years that I was there it was a fifth-year center, and with the changeover to the neighborhood schools, we have different grade levels, different types of supplies and equipment. So we had to resupply the school for the K-4 building.

Q. But did you acquire those adequate supplies?

A. Yes. Yes.

Q. And was the district receptive to your request for supplies?

A. Yes. As a matter of fact, we were encouraged to be sure that everything was there that was needed upon opening day.

Q. Are you afforded input into the supplies or textbooks at your school?

A. Oh, yes.

* * *

[p. 790] Q. And your staff is mixed; is that right?

A. Yes, it is.

Q. Based on your observations, what was the reaction of parents to the neighborhood school plan?

A. Parents were excited about having a school where they could enter almost any time during the day. As a matter of fact, during the first few weeks of the school year when we reimplemented the neighborhood school, parents would come and want to just go into the room and visit because they had never had this opportunity before.

At dismissal time, there were so many parents standing around the door that we couldn't get the doors open to let the children out.

So that they were very excited about it. They – they were just available and anxious to be a part of the school.

Q. Do a lot of parents walk up to the school?

A. Yes, they do.

Q. What are some other ways that parents have gotten involved in the school?

A. I have parents who volunteer in the classrooms or in any way that we need parents at school, which they did not have this opportunity before.

[p. 791] Our neighborhood is compriesed [sic] of many indigent families who don't have transportation, so therefore they can walk to school.

They help directly in the classroom. They come up and have lunch with their students. Those who work outside the home can come for early conferences, 7:30 in the morning, or make an effort to be there by 3:00 or 3:30 in the afternoon.

So there were many avenues opening up to parents to be directly involved with their students and with their schools.

Q. Ms. Scobey, has that level of parental involvement changed with the implementation of the neighborhood school plan?

A. I believe it has. During the time that we were a fifth-year center, parents came as we needed them to come. But now many times parents do volunteer to be involved.

Q. In your opinion, do parents support the neighborhood school plan?

A. Yes. The only objection which I have heard is that some of the students do have to walk longer distances, and parents have a concern about that.

Q. Do you have parents that sometimes assist children walking to school or assist at crosswalks?

A. Yes. Upon opening of school the first year of the neighborhood plans, students – I realized that the students had never had to cross a street before and had no idea how to do so safely. So they would just bolt out of the door across [p. 792] the traffic.

Parents who saw this – as a matter of fact, a grandparent who saw this happening, volunteered to man the crosswalks. We had two parents every day at 3 o'clock who were there, until the health of one of them failed, and she's no longer able to do this, and the father had to gain other employment. But they volunteered to bring order to dismissal, which helped us a great deal.

Q. Ms. Scobey, in your opinion, do the students appreciate or enjoy having a neighborhood school?

A. The students are very proud, because many of them are attending a school that their parents attended, so they have a special sentimental attachment to this particular school. And I can only speak for Truman. But, yes, the students are very proud.

As a matter of fact, during our recognition of student of the year, one of the students wrote that he was very glad to be there because he had been involved in more activities than he had ever had an opportunity to participate in, and he was a fourth-year student.

Q. What kind of extracurricular activities do you have at Truman?

A. We have Boy Scouts, which is not new. We also had that during the time of the fifth-year center. But we've also had Girl Scouts added.

[p. 793] We have a teacher who volunteers to do a little thing we call the Truman Troopers, and they come in before school, sing, do plays which they present to the student body or at PTA meetings.

Students have had the opportunity to perform for their parents during night meetings.

Parents have come up to have lunch with their students.

If we have special activities on the playgrounds, such as our 89er day, which was named "Truman Hoedown," parents came up and were involved with the students in kite flying and other outside activities.

Q. Were you able to have extracurricular activities to this extent before the neighborhood plan?

A. Not at Truman. No, we did not.

Q. At any other Elementary School?

A. At the previous school, yes. At the Western Village School where I was principal seven years, we did have a high level of parent involvement there.

Q. And was that a stand-alone school?

A. It was not a stand-alone school my first five years, but the last two years it was a stand-alone school.

Q. If students were bussed, would they be able to be involved in activities like the Truman Troopers?

A. They are limited, in that they must observe the bus schedule.

[p. 794] I might add that we can also provide students extra time to do academic work. Many times students would leave their homework or be absent for a day or two, and they can come in or stay late after school and complete their work assignments.

Q. Have you noticed a change in discipline with the implementation of the neighborhood school plan?

A. Yes. Our students, during the first year of the neighborhood plan, felt that they had to fight, and I cannot say exactly why they had to fight, but we had more referrals for fighting during the first year than we did the second year of the neighborhood plan.

Q. Has it been easier to discipline students with the neighborhood plan in any respect?

A. It is easier in that parents are available to us. We can see a parent when they bring the child to school or when they pick a child up from school. We don't have to suspend them for long periods of time for minor discipline problems, and that, in itself, makes it much better for us.

Parents will arrange to come early in the morning, or I can get in my car and take a child to the parent, if that becomes necessary.

I have often visited parents in their homes after working hours. They're just more available to us.

Q. Have you been able to use after-school detention as a disciplinary measure?

[p. 795] A. Yes, we do. We keep students for about 20 minutes after school.

Q. Could you do that if these students were bussed?

A. No.

Q. Have you been trained in the district's effective schools program?

A. Yes, I have.

Q. Have teachers in your building been trained?

A. Yes, the majority of them have.

Q. Do you set goals at your building?

A. Yes.

Q. What are some of those goals?

A. One of the goals which we set this year was to increase parent involvement.

Another goal was to raise our achievement scores closer to the 50th percentile.

And our immediate goal was to raise those scores by six percent during the first year, six percent the second year, and by the third year we hope to have our students at the 50th percentile in reading and math.

Q. Have you achieved some of those goals?

A. We came within one percentage point, in a quick review which we did at the building level, in the first grade. The other two grades did not get that close. But the first graders did get within one percentage point of reaching our goal.

* * *

[p. 798] Q. In your opinion, does the school board or the school administration discriminate in any way against students at Truman School?

A. No, I don't believe so.

Q. Or the faculty?

A. No.

Q. Or the parents?

A. No.

* * *

LINDA JOYCE JOHNSON

Linda Joyce Johnson, (A black female)
being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. DAY:

Q. Ms. Johnson, state your full name for the record.

A. Linda Joyce Johnson.

[p. 802] Q. What is the affirmative action goal set forth in that plan?

A. The goals set forth in this plan are twofold. There are building goals, which are building staff goals, and those goals are black other, for the black teaching staff in each school building. The goal is that each building has a black teaching percentage 36.9 with a ten percent variance plus or minus.

There are also goals, district-wide goals, and those are for all races. I believe those goals are – they begin on

page 35 and they're by category, not just for black other, they're for all races. We have a goal for Asian males, for example, in the elementary teaching field.

So the district-wide goals are by category. Those categories are defined from the EEO-5 report, which is 17 broad categories.

Q. In your opinion, as the affirmative action officer for the district, does the Oklahoma City Board of education attempt to [p. 803] implement its affirmative action plan in good faith?

A. Yes.

Q. Does the board of education have an affirmative action and equal opportunity policy –

A. Yes, they do.

Q. – In addition to this plan?

A. That is correct.

* * *

[p. 809] Q. Have you recently made any recommendations to the board of education concerning its affirmative action policy?

A. Yes, sir, I have.

Q. Would you give us the background behind that, please?

A. One of my goals this year was to recommend a plan to balance the schools. So, in order to try to obtain that goal, I prepared an affirmative action plan for balancing the schools and worked with my supervisor in devising that plan.

Q. Was this done in conjunction with the closing of the seven schools and the reassignment of faculty for those schools?

A. Yes, it was.

Q. Okay.

A. Okay. What the plan did was outline some steps for – what the plan did, it outlined steps for principles, personnel, and the affirmative action office to follow in order for us to try to get more schools into compliance with the current affirmative action goals.

Q. Is that exhibit 193, Ms. Johnson? Was that your recommendation to the board this past April?

A. Yes, it is.

Q. How did the board respond to your recommendation?

A. This recommend was approved by the board.

Q. Is that shown in the official minutes of the board meeting?

A. Yes, it is.

[p. 810] Q. Is that – are those minutes set forth as exhibit 194?

A. Those are the minutes.

Q. There's been previous testimony from Mr. Vern Moore, Executive Director of Personnel, that as a result of the closing of the seven elementary schools this past year, the primary consideration of faculty reassignment was affirmative action.

Was that your understanding?

A. That is correct. That is my understanding.

Q. And was your recommendation to the board this past spring consistent with that goal?

A. Yes, it was.

Q. You mentioned earlier in your testimony that if an employee in the school district felt that they were being discriminated against on the basis of race that they could file an EEOC complaint; is that right?

A. That is correct.

Q. And in the position of affirmative action office, do you know when such complaints are filed?

A. Yes, I would.

Q. Do you recall when the board implemented their neighborhood school plan in 1985/86?

A. Yes, I do.

Q. The K-4 neighborhood school plan?

A. Yes, I do.

[p. 811] Q. That plan has now been in operation two years.

As a result of the faculty assignments resulting from the implementation of the board's 1985 student assignment plan calling for neighborhood schools, did any teacher or faculty member file an EEOC complaint in connection with their assignment claiming race discrimination?

A. No, sir, they did not.

Q. Has any black teacher filed an EEOC complaint because he or she was not allowed to teach in a black school in the northeast quadrant?

A. Yes, sir, they have.

Q. Tell us about that.

A. We have one complaint pending from a black non-continuing contract teacher who was not placed at green pastures this past school year. This complaint was filed with the EEOC and it is pending at this time. She was not placed at green pastures because the black faculty at that particular school was above the goal. That was one of the reasons.

Q. Do you find it common that black personnel wish to be stationed near their homes?

A. I can't answer that based on facts, because I really don't get involved with all of the personnel hiring.

Q. Okay.

A. I have had occasion to hear about that, but I do not know directly.

[p. 812] Q. In your opinion, as the board's affirmative action officer, did the school district, through the implementation of the 1985 K-4 neighborhood plan, discriminate against black faculty members?

A. No, it did not.

Q. Since you have been employed by the Oklahoma City School District, has the Board maintained an integrated faculty?

A. Yes, it has.

Q. Has the board maintained integrated staffs?

A. Yes, it has.

Q. Has the board maintained integrated administrative positions?

A. Yes, it has.

Q. And has the board maintained a group of integrated support employees?

A. Yes, it has.

Q. Throughout the school district?

A. That is correct.

Q. In your opinion, does the Board's affirmative action plan and affirmative action policies discourage race discrimination?

A. In my opinion, yes, it does.

* * *

[p. 814] THE WITNESS: It is my opinion that the Oklahoma City Public School District is a Unitary School District. The board is racially integrated, the staff, the student body, and, as a parent, I also know that the activities, the extracurricular activities are also integrated.

THE COURT: Has this integration that you tell the court about been a part of the program of the school board at all times since January, 1977, when the court terminated its jurisdiction? Do you have an opinion as to that period of time?

THE WITNESS: I do not have an opinion as to that period of time.

Restate your question. I'm not sure I understand what you're asking.

THE COURT: Well, after the court surrendered its jurisdiction, to date, –

THE WITNESS: Uh-huh.

THE COURT: – Has the school board operated a Unitary school system?

THE WITNESS: Yes, I do have that opinion that it has operated as a unitary school system.

THE COURT: Now, does that include the K-4 plan also?

THE WITNESS: Yes.

THE COURT: Did the – in your opinion, does the K-4 plan in any way disturb the Unitary school system that's been [p. 815] in operation?

THE WITNESS: Oh, no, sir.

THE COURT: Has there been any discrimination that you've been able to find on the part of the school board in the establishment of the K-4 plan?

THE WITNESS: No, sir.

THE COURT: Is it free of discrimination?

THE WITNESS: In my opinion, yes.

THE COURT: Do you have an opinion as to the public acceptance of the Unitary school system as it's now operating?

THE WITNESS: I have an opinion that it's been accepted by many, and also there are some who have not accepted it for various reasons.

THE COURT: Do you have an opinion, from your knowledge and from your work and services you have performed for the past several years, whether or not the Unitary system would continue if the court, you might say, abdicated further duties?

THE WITNESS: It is my opinion that the Oklahoma City Public School system would remain as a Unitary School System.

* * *

(21)

No. 89-1080

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

vs.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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RECORD, VOLUME VI

GARY E. BENDER

* * *

[p. 831] Q. Do you serve on the Equity Committee?

A. Yes, I do. I'm chairman of the Equity Committee.

Q. How long have you been chairman?

A. Two years.

Q. Both years that it's been in operation?

A. Yes, sir.

Q. Does the NAACP have representatives on the Equity Committee, to your knowledge?

A. Yes, sir, to my knowledge, three.

Q. Does the Urban League have representatives on the Equity Committee?

A. Yes, sir, to my knowledge, one.

Q. Would you explain for the court the type of things that the Equity Committee has looked at during these last two years?

A. What we've focused on is facilities and textbooks, various areas of building maintenance, areas that we felt that would be [p. 832] an equitable issue. Of course, sometimes if – you run into if one bathroom leaks and the other bathroom leaks across town, that's an equitable issue.

But we have tried to make equity across the board so that each child is being taught the same material, have

the same textbooks, the same material, the same opportunity to learn.

Q. I'd like to direct your attention to defendant's Exhibit 107, which is in evidence, and may be in the book in front of you. That particular exhibit has already been admitted into evidence as a document containing materials concerning the activities and functioning of the Equity Committee.

While you were on the Equity Committee, and in doing this type of work did you make a determination as to the condition of the facilities in the northeast quadrant of the District as compared to other facilities throughout the Oklahoma City District?

A. Yes, we did.

Q. What were your findings?

A. It was surprising. We found that the building usage or the run-downness of the buildings were not in the northeast quadrant, but they were also in the – there were more in the south, southeast part of town. The buildings in the northeast were fairly decent and comparable to the buildings in the north part of town.

Q. Did the Equity Committee do any studies regarding the [p. 833] quality of teachers or the ability of teachers or the degrees that teachers held throughout the district?

A. Right. We asked for that. We came back and we asked for that. We felt that there may be a loophole that we were missing in equity if we didn't find out how the teachers were fairly educationally in breakdown, and we

did do that study, and the study is contained in this section here.

I would like to say that we did find out that teachers, across the board, were teaching and children were learning on a great – on a large scale, and they were professionally involved across the district.

Q. Did the committee analyze the level of parental involvement at the various elementary schools?

A. Yes, sir, and this is where we're going to have to make the – a more bite in the equity issue, in that we found that, even like in the Northeast Quadrant, if you had a school who had an active PTA and PTO, then the school was being supplied, the teachers were being supplied with everything they needed, whereas, right down the street you had an inactive PTA, then there was an inequity situation right there in the same neighborhood. There's going to have to be more of a bite and an upbuild of the PTA and PTO in the school district across the board.

Q. Do you feel that as a result of the implementation of the neighborhood plan that the level of parental involvement in the [p. 834] district has increased?

MR. SHAW: Objection, Your Honor. Leading.

MR. DAY: I'm asking for an opinion.

THE COURT: Overruled.

Q. (BY MR. DAY) Let me restate my question.

A. Yes, sir.

Q. Do you have an opinion as to whether or not the level of parental involvement in the Oklahoma City schools has increased since the implementation of the K-4 neighborhood plan?

A. We have found that some PTA's have flourished because of the neighborhood school program.

Q. Now, when the Equity Committee would find a defficiency [sic] in any school in the district, what would they do?

A. Well, a point in case, we found a very high defficiency [sic] in Telstar, and we were very concerned about the kids. They were disabled kids who were being – didn't have the right facilities.

We immediately went back to the board – well, to Elton Mathews and related our concerns to him, which they – the district – I mean the board, the administration got on it right away and corrected the errors.

And we found that throughout the two years, that when we find defficiencies [sic], such as termite damage, asbestos, or whatever, they were real helpful in responding to that immediately and didn't let it lag, just got right on it.

* * *

[p. 837] Q. What is your understanding of the purpose of the majority-to-minority transfers?

A. Well, my understanding there is that the parents have a right to have their child go anywhere they would like them to go.

Q. For what purpose, though? What is your understanding of the restriction?

A. To me it would be for convenience. At the time Cory was going to Quail Creek, he could come back in the first grade and go back to Village as a day care. We didn't trust him with a key, but – and Candice was at Quail Creek. And so – I'm sorry, Village.

Q. No, I didn't mean to interrupt you.

A. Oh, that's okay.

But – so we felt, as a convenience, they would be in the same place, we are a close family, and to me it's just convenience. Wasn't anything – that's why we opted that. We have that option.

* * *

[p. 840] Q. I believe you mentioned that buildings that have more active PTA's get more of something. Would you describe what it is they get?

A. Well, it could be pencils. If you have an active PTA and the teachers request – if you're familiar with PTA, I'm sure you are – the parents – the teachers may request something from the PTA, then the PTA would respond to that need. If you didn't have an active PTA, you could go in and find, in a case in point, pencil sharpeners, each class would have one.

Q. Who is providing those pencil sharpeners?

A. The parents.

Q. The parents?

A. Right.

Q. And if the parents do not provide the pencil sharpeners or the PTA is not active, then I take it that it may be that the students will go without those pencil sharpeners?

A. No, they'll just go with less.

* * *

[p. 842] Q. Part of the dissatisfaction has based upon the notion that interaction occurred only once a year, wasn't it?

A. Right. But in some schools it occurred three times – in actuality in numbers, sometimes one school, and that of King, had six occurences, three by letter and three by visit.

So some flourished while others didn't, and that's – that's our aim for this fall, to insure that that takes place.

Q. Why is the student interaction plan even necessary?

A. Well, it's a balance. It's – it's to help each child that is in the – a child that's in another area know another child and become familiar with that child so when they get do [sic] a fifth-year school – center that they would know each other.

Q. Why is that important?

A. Well, it's important for – as they grow, they learn each otner. They know the – when they get to another school, they won't be so frightened, without having no

knowledge of individuals there. They'll know somebody, have a friend there, they'll have acquaintances there.

* * *

ROBERT A. BROWN

[p. 848] A. * * * Incidentally, as a reading specialist I was in the Chapter I Program.

I was an assistant principal at the Middle School level for two years, and then last year moved to principal at the elementary level.

Q. Where were you assigned immediately before your assignment at King?

A. I was at Moon Middle School. That's in the same area.

Q. Based on your educational background and experience, do you have an opinion, Mr. Brown, as to whether or not the racial composition of the schools affects the academic achievement of black students?

A. It does not.

Q. And would you tell the court why you hold that opinion?

A. I hold that opinion based on 17 years working with predominantly black students. 18 years I'd have to say now. And in that time what I have seen is that blackness is just another element that you consider in dealing with children. It does not predetermine or determine what's going to happen to them educationally. That's made up by the staff, by the teachers, by how you work with the children.

* * *

[p. 849] Q. Was there any particular reason why you wanted to be assigned to King Elementary?

A. I did not have a lot of – a lot of input as to where I was assigned, but I was very pleased with the assignment. It matches well with my experience.

The students, academically, at King need the kind of expertise that I have in the area of reading, and I think by – you know, we were talking about that earlier just now. I think that, by applying that expertise and by working with that staff and by addressing those problems specifically, that I'm in the right spot. I think I'll do some good things for that school.

Q. Do you hold an opinion as to whether or not parental involvement in the child's educational process has an impact on academic achievement?

A. Certainly. It certainly does. Yes, it has an impact.

Q. Why?

A. The – the child that we deal with at school goes home. If what we are doing is supported, is carried on, even, at the home, then you've – you've got a better chance to effect any kind of chance you want to. The child's going to learn more.

I have a lot of parents that come in with concern about children, and they will ask what they can do at home, and they're given instructions and materials and things that they can use at home. They can certainly make an impact.

* * *

[p. 853] Q. At this point in time, Mr. Brown, do you favor the school board's Neighborhood Plan?

A. Yes, I do.

Q. Why?

A. At my building, it's – it's generated a strong sense of belonging, a strong sense of ownership among the children. It's – it's developed a feeling about the school that I didn't see, or at least didn't see as much of in the days when they were transported all over the district.

In my building I've got parents who are in the building daily, and not just one or two, but several daily. I've got PTA participation by parents who walk over who would not be able to attend otherwise.

It enhances everything we do. The instructional program has improved. The teachers are able to make quick contact. We have quite a few parents without telephones. I've got teachers that go by their homes and see them because they're right there [p. 854] in the area. I've got parents that we can send letters home to and they show up the next day.

To those of us that have been in the district a long time, parents participation is definitely up.

Q. Have you personally noted an increase in the level of parental involvement in the district since the Neighborhood Plan was implemented?

A. In those buildings where I've been working, yes.

Q. Have you noticed any change in the discipline problems of students since the implementation of the Neighborhood Plan?

A. There's a – there's a quicker response from parents in discipline problems. I don't have near the problems that we used to have in getting the parents to come in. It's –

You know, as we go through the year there are some kids that get in more trouble than other children, and I'm getting those parents up without exception. I couldn't say that in previous years. There were several people who I never saw.

Q. Does King have a viable PTA unit?

A. Yes, it does. It's very active.

Q. Do – you mentioned earlier that those parents sometimes come to school and volunteer to do various things. Would you tell the court some specifics in that regard?

A. Yes. Not only the PTA members, but we have other parents as well, who will come into the building.

Because we're – because we're neighborhood and they're [p. 855] able to just walk over in many cases, you know, two or three blocks. They come in and they stand in with classroom teachers. They work in a support room there. They come in and support us on fund raisers.

Our major fund raiser was run almost completely by parents this year, and, in this day and age of budgetary considerations, that's real handy.

They tutor children. They help the teacher get material ready. It's not at all uncommon for the parents to be running off things for teachers, to be going from different – room to room to bring things to them. Just they're involved in every way you can think of.

* * *

[p. 860] THE COURT: And what is that opinion?

MR. SHAW: Your Honor, I would just like to note our continuing objection.

THE COURT: Yes, you have it.

THE WITNESS: I think that the Finger Plan achieved the objective of creating a unitary district.

THE COURT: Do you have an opinion as to whether or not the unitary system continued after the court released its jurisdiction in 1977 to and through the year 1985/6? Do you have an opinion?

THE WITNESS: Yes, sir.

THE COURT: And what's that opinion?

THE WITNESS: In my opinion, the unitary school system is still going. It's still in existence.

* * *

BILLIE LEANNE OLDHAM

[p. 863] Q. Do you have an opinion as to whether or not there has been an increase in the amount of parental involvement in the school since the adoption of the Neighborhood Plan?

A. Yes, I do.

Q. What is your opinion?

A. I feel like it's increased tremendously. I have spent a lot of time in the different buildings across the district helping them to organize their units, and I see a great increase in our parental involvement.

Q. Do you believe that if the Neighborhood Plan is allowed to continue that we will see additional increases in parental involvement?

A. Yes, I do, because each year – when they first start, it's usually just a handful of parents, but then as they get going and the parents see that there is a real value, you know, they want to continue to be involved. So it will just continue to grow. Everybody wants to be involved in something that's exciting.

Q. In your opinion, if parents become involved in a PTA while their child are [sic] in grades K through four, would they be more likely to remain active in the PTA when their child attends grades five through twelve?

A. Yes, I feel like they would, because you're – just like anything else, you are building a base.

* * *

[p. 868] Q. Do you – have you attended any national PTA conventions?

A. Yes, I have.

Q. Do you have any knowledge about the trends in PTA participation nationally over the past decade or two?

A. Well, not really. Not as far as – because I haven't been involved in capacities that I could answer that question.

Q. Now, are you aware of the increasing participation of women in the work force over the past decade?

A. Yes.

Q. And does that include, to your knowledge, women who are the sole support of their families as a result of divorce or other family changes?

A. Yes.

Q. For those parents who have returned to the work force, would it be more difficult, in your opinion, for them to participate in PTA activities than if they were not in the work force?

A. It's more difficult maybe during the daytime, but a lot of people have flexible job schedules.

That's part of the PTA's job. As our society changes we, must make changes.

* * *

JOHN JOSEPH LANE

[p. 880] Q. And what inferences did you draw from your conversations?

A. In terms of the individuals, I found them competent, even enlightened, very well connected with national organizations and what was going on beyond Oklahoma. I would have to go so far as to say that, by any definition, they are professional individuals.

I would have to say that, as I listened to them, I gathered a picture of – beginning to form a picture of a

very progressive kind of district, fair in its public statement of policy. I found people very willing to be involved.

I sensed that the board was very hard working and willing, unlike what I have seen in other districts, frankly, to be very collaborative with the central office.

Without waxing too eloquent here, or attempting to be, I found, time and again, that their stated philosophy of establishing excellence is, in fact, a dream, but it's one that I think they're taking the steps to realize.

Q. Doctor –

A. They firmly believe that every child can learn.

Q. Doctor Lane, you have looked at a number of other school districts. How does Oklahoma City School District compare to those other districts?

[p. 881] A. In what regard?

Q. In implementing an effective schools program and in carrying out their instructional philosophy.

A. It compares very favorably. As I look – as I personally have tried to, over the years, develop effective schools before it was in vogue to call them such, I have found that this district, laboring under tremendous fiscal constraints, has made giant strides.

In the area of communication with parents and among the staff themselves, I – I've seen great progress.

In terms of leadership, emphasis on instruction, monitoring closely the progress of the children, it's really already exemplary.

Q. Why did you then also conduct interviews?

A. Well, frankly, to get out into the field and see if what I read and what I heard was true.

Q. And how did you go about conducting these interviews?

A. I have already indicated that I had worked with the North Central, and I opted to – to take that approach, that I would – I had already read the documents, I have visited with key individuals. I would now, instead of visiting classrooms, I would visit individual school sites and interview with the principals.

* * *

[p. 885] Q. So no principals felt like they were being cut short or any favoritism shown; is that right?

A. That's correct.

Other kinds of questions in that regard dealt with central office support for the schools, and here I was looking for a kind of – I can't even say the word measure, exactly – but a soft measure.

Over the years, I've also noticed that schools can be excluded from connections, if I can put it that way, with the central office. The principal calls and there's no response. And I asked questions along those lines: "When you call the central office, are you met with courtesy? Do you feel that there is a response, that you will get support?"

I was looking for two things, as I have said, one for uniformity, but also, since the district says that it is an effective school district, support for the local school is, in

addition to the five correlates of school effectiveness that have been mentioned several times in testimony, school support is yet another one, and I found, once again, that all of the principals felt that when they called there was response and support.

In the same vein –

Yes.

* * *

[p. 889] Q. Doctor Lane, did you also look at curriculum?

A. Yes, I did, with two particular things in mind. One, of course, to see whether, in fact, the curriculum was uniform across the board, and the other a more concrete kind of thing. I've already referred to curriculum guides. I wanted to know whether, in fact, curriculum guides were available and were they being used.

I found that, in fact, the curriculum was uniform across the board, that curriculum guides were being used, but the principals, moreover, required lesson plans, and these lesson plans involved the curriculum guides.

* * *

[p. 891] Q. Doctor Lane, there's been lots of discussion in the case about parental involvement.

In your professional opinion, how important is parental involvement to a student's education?

A. The two principal agents in the education of a child are the teacher and the parent. Any program that will bring the teacher and the parent closer together is a good program, it seems to me.

The parent gains better understanding of the school's objectives, the teacher's personal objectives, the teacher's perception of his or her child, and they are able, collaboratively, to work for a better education for the child.

Furthermore, some experts have estimated that, though it's quality time, we hope, a child is in school about 13 percent of the time. 87 percent of the time, between roughly birth and age 18, is spent out in the community and with the family.

Anything that can augment the positive aspects of an education in that neighborhood and with the parent and the teacher is a positive thing and a good thing.

* * *

[p. 893] Q. So in every school there was some type of involvement of parents?

A. Some type of – some type of involvement, with the exception of two schools. I can't quite recall which, but I do remember that there were two that didn't have the them, but the other 28 schools did.

Q. Was it your impression that this involvement had increased over the last two years?

A. It was the report of the principals that it had increased, and, in some instances, had increased dramatically, some nothing that parent participation had moved from 13 to 30, 35 members, which is – is quite an increase over a period, frankly, of just a few months.

Q. Did you also look at facilities?

A. Yes, I – yes, I did. I didn't know until testimony yesterday that there was need for about 200 million dollars in repairs, but, as a lay observer of that kind of thing, I can – I can attest that there – the buildings of many of them are in – in serious need of, perhaps, some structural changes and improvements.

Nonetheless, I found that the schools were clean, well maintained, and, in accordance with both my inquiry about uniformity and about matters relating to school effectiveness, they provided safe environments.

[p. 894] Some principals did express concern about the presence of asbestos, and I understand that that's before the board and they understand that something needs to be done.

Q. But was it your general impression that there was uniformity among the schools regarding their facilities?

A. As with finance, as with teachers, as with facilities, the principals reported that, in fact, the district is financially strapped, if one suffers, we would all suffer. That, in fact, the formulas devised for allocation of resources were very scrupulously followed.

* * *

[p. 897] Q. In your professional opinion, and based on your observations throughout the district, is the effective schools program working here in Oklahoma City?

A. Yes, indeed it is. In addition to the five correlates that they have announced as characteristics of school effectiveness, more recent research has lengthened the list a bit to include the very kinds of things the district is

doing; namely, other hallmarks of an effective school are those which, in addition to the five that have been mentioned, strong instructional leadership through monitoring, include also such areas as involvement of parents, collaboration between the central office and the site-level schools, support from the district office up and down the line, planning and communication, and these are in evidence.

Q. Does the Neighborhood School Plan enhance an effective schools program, in your opinion?

A. Yes, it does, because a neighborhood school can insure greater parental involvement, and one of the hallmarks of an effective school is parental involvement. Neighborhood schools perhaps can help in that – in that regard.

Proximity means easy access, and that's very good, and the neighborhood school does help that.

Q. In your professional opinion, is a Neighborhood School Plan educationally beneficial?

A. Yes, it is.

* * *

HERBERT JOHN WALBERG

[p. 913] Q. Doctor Walberg, do you have an opinion as to whether or not the racial composition of a school has an effect on academic achievement?

A. Yes, I do. I think that racial composition of the school is irrelevant to how much children learn in school, and no particular racial composition, such as zero, ten, fifty, ninety, or a hundred makes important difference for how much children learn in school.

Q. What do you base this opinion upon?

[p. 914] A. May I consult my notes, Mr. Day?

Q. Certainly.

A. I base this opinion on a series of studies that have been done since 1966, the first of which was the – sometimes called the Coleman report. It was the survey of "equality of education opportunity," which was a study of some 600,000 elementary and secondary students throughout the United States, carried out for the United States Congress.

There have been analyses of that survey, and they have indicated, collectively, no relationship of – that is, black-for-black learning, how much black students learn in school to the racial composition of a school, or at least inconclusive results and a great deal of disagreement.

There have also been major compilations of smaller-scale studies, particularly various kinds of programs to change, either on a voluntary or a mandatory basis, the racial composition in cities and in metropolitan areas. Some of the reviewers of this have included Nancy Saint John Others.

I would say that perhaps the most important compilation of this evidence was conducted by the National Institute of Education in 198- – 1982, in which six investigators who had experience in doing research on this particular question were brought together by the United States Department of Education to try to resolve this question. The results of the compilation indicated an inconsistent and a very small effect, very [p. 915] close to zero, such that some studies had had a positive – a small

positive effect, some studies have had a negative effect, but in comparison with the kinds of things that I had talked to you about earlier, these nine factors, they were extremely inconsistent and had little impact on learning.

Followups on that, such as Dennis Cutty in 1983, who reviewed this whole compilation, and I'd like to quote what he said.

"The conclusion to be drawn from these 19 best studies is that desegregation has not significantly improved black achievement levels. What slight positive nonsignificant gains there were in the 19 studies, came from the 14 voluntary programs as the five mandatory programs slowed collectively either no gain or an actual decline in academic achievement."

Now, this is the basis for my conclusions.

Q. In your opinion, will the fact that some students in Oklahoma City next year will be attending K-4 elementary schools that are not precisely racially balanced have any effect on the academic achievement of those students, either black or white?

A. I don't think it will have any effect at all.

Q. Doctor Walberg, do you have any opinions concerning the academic benefits which neighborhood schools offer?

A. Yes, I do.

Q. Would you tell us about those?

[p. 916] A. I mentioned the studies of parental involvement or what I call the curriculum of the home,

and in compiling studies, I have published a review of this literature of the studies that had been made throughout the United States in the last 20 years and found that these studies had extremely good consequences for the academic learning of children.

Most of the studies – the experimental – that is to say, the randomized field trials in which some children were given special parental involvement programs, or the curriculum of the home, special tutoring and close relationships between the parents and students, indicated quite sizeable and consistent results.

In addition to that, I personally conducted a study in Chicago about a dozen years ago in an all-black area of the city of highly educationally disadvantaged students. I was asked to help plan the particular program and also to analyze the statistical test scores, and I also found in my own personal studies that there were quite strong and good effects.

* * *

[p. 918] Q. Have you reached any conclusions as to the educational offerings presently in the Oklahoma City School District?

A. Yes, I have. In my opinion, the school board goals and their plans are great aspirations. They have decided to have an urban thrust to strive to become a nationally-recognized model urban district.

They have a number of other goals which they've set forth for themselves, and most important of those is the general excellence in student achievement and learning.

They've tried to, among other goals, assure equity, pride, and success in the reassignment plan, create a positive teaching-learning environment, upgrade the instructional effectiveness of teachers and the instructional leadership of administrator. They have attempted to target financial resources to effectively achieve short term and long – priorities and short range plans.

And finally, they have tried to build harmonious working relationships among the board, superintendent, employees, residents, and other interested parties.

[p. 919] I would say that they have set forth these goals and concentrated their efforts on that.

In addition, that's already been mentioned, they have mounted what I consider to be an extremely ambitious and successful school effectiveness program with the five major goals that have already been described. But, in addition to that, I consider the parental involvement programs highly – have been increasing vastly, and they've also been very successful.

I would say, finally, that the school district has been extremely successful in trying to base what they do on educational research. They have a good – excellent, I would say – research facility. They've been collecting an immense amount of achievement date and putting a strong focus on trying to choose those kinds of programs that would help most effective in helping all the children with respect to their learning in the Oklahoma City Public Schools.

Q. Where do you see the school district headed?

A. I think that the school district, if it keeps these programs in place, and also can increase the – make them more – still even more widespread, – and I think that they are near the national norms now. I think they've been increasing in the last couple of years, but I think that they can increase still further.

In particular, I think that it's cause for celebration, [p. 920] having more PTA's and PTO's and increasing the membership, but I think that the school district can push things even further to get not only some parents in the school but more parents in the school.

And secondly, I think that we have the beginnings, although it's very valuable to raise funds, and I think that the school district is strapped for funds, but I think – and the parents have been able to raise additional funds for the school, but I would like to see them doing even more than this in having what I would call more of this curriculum of the home or parental involvement, such that some of the activities could be focused on more volunteering of parents in the schools, more tutoring – voluntary tutoring in the schools, and having the teachers giving hints for the parents and various kinds of program activities that they can carry out at home, particularly involving home work and other kinds of activities that research has shown has been very conducive to learning and educational achievement.

Q. So I take it, Doctor Walberg, you are of the opinion that parental involvement does have an impact on student academic achievement?

A. It has an extremely consistent impact, and it also has a very large impact from the studies that have been made throughout the United States in the last 20 years.

Q. What conclusions did you reach based on your interviews [p. 921] with the PTA presidents?

A. The conclusions that I reached is that the major activities that they have been engaging in is raising money for the schools. They've also had a series of volunteer activities, such as book fairs of various kinds.

The other activities include some tutoring and some provisioning of information about what the school district is trying to do and the unique characteristics of that particular school, as well as providing information about the personal requirements that teachers may have or what the teachers are trying to do with particular children.

I also sensed from my interviews with the PTA presidents and other representatives that they believe strongly in the value of parental involvement; that is to say that many of them believe that it – and mentioned that it promotes learning; that it promotes a pride in the school, that it increases friendships of children and parents and parents with one another; that it is exceptionally good for discipline, because the parents can be very – in close touch with the teachers.

They also mentioned that parents can support one another's efforts by knowing what other parents are doing in the school.

They also mentioned the fact that parental involvement can promote more homework, which is very conducive for additional learning.

Other conclusions that I made is that a number of the [p. 922] parents wanted to increase the membership in their school and also increase the scope of activities, particularly along the lines that I was suggesting earlier, not just raising funds, but more volunteers in the school and more parental involvement.

I also thought that it was interesting that in some cases grandparents were involved with the PTA. And so there was some sense of inter-generational continuity from one group to the other.

There were a number of other miscellaneous points that people mentioned about how they might send some of the children to camps, for example.

And then I also looked into the question and asked them about the – whether they believe that, for those that were in the K-4 schools, whether distance was a factor in parental involvement, and I learned that they felt that it – when the parent is closer to the school, it minimizes the distance – some of them view it as a safety factor. Some of them also mentioned the fact that it was much more practical, and that they could increase their – that parents, generally speaking, could be more involved in the school if they live closer by and it was easier for them to get there.

Those were my main conclusions.

* * *

[p. 927] Q. Do you draw any particular significance from this exhibit, doctor?

A. Yes. I have – I can look at this exhibit and see that, although there are some exceptions, generally speaking the higher the percentage of students that have free lunch in the school, the lower the achievement levels, and the fewer the children that get free lunches, indicating higher socioeconomic status school, the higher the achievement levels within the school.

Q. Which elementary school in the district had the lowest achievement scores, overall?

A. I believe that the Willard School, which is second – numbered second, has the lowest achievement.

Q. And what is the achievement NCE for Willard?

A. It's 37.7.

Q. Now, what percent of the students attending Willard were receiving free lunch?

A. 81.1 percent.

Q. And what percent of the student body at Willard is black?

A. 6.6 percent.

Q. What percent is other minority?

A. That's 51.9 percent.

Q. And what is the percent white?

A. 41.5 percent.

[p. 928] Q. Now, do I understand correctly doctor, that the Willard School, which was only 6.6 percent black,

had, overall, scored lower on achievement tests than any of the schools in the district that are 90 percent or more black?

A. That's correct.

Q. I'd like to direct your attention at this time to Exhibit 184, which has also been received in evidence, and I'd like for you to identify an[d] explain that exhibit to the court.

A. Defendant's Exhibit 184 is entitled "Oklahoma City Public School's Third Grade Metropolitan Achievement Test."

It shows, for two school years, the students' national percentile rank on read – the reading and the mathematics test on the Metropolitan Achievement Test. The two school years are 1985/86 and also 1986/1987.

Q. What significance do you find in this exhibit?

A. I find that when the total population of the school district is examined at the third-grade level where test scores were available, that there has been improvement in achievement from 1985/86 to 1986/1987.

In the subject of reading, the percentile went from the 43rd to the 45th, and in the subject of mathematics, the school district went from the 45th percentile to the 51st percentile, which is above the national average.

* * *

[p. 933] Q. (BY MR. DAY) Just briefly identify the exhibit for the court and explain it, please, sir.

A. This is entitled "Oklahoma City Public Schools third grade achievement results by race." It shows the mean normal curve equivalent score on the metropolitan achievement test for the two most recent school years, 1980 –

I'm sorry, I have the wrong exhibit here.

It's third to fourth grade gains. I'm sorry. This is for the schools that are – have more than 90 percent black students in them. Gives the names of the schools across, going from Creston Hills and including Dewey, Edwards, Garden Oaks, King, Longfellow, North Highland, Parker, Polk, and Truman.

It shows that the students in these black schools, predominantly black schools, are making substantial – have played substantial gains during this – from third to fourth grade in the period 1986 to 1987. Eight of the ten are positive. One or two schools did not make such high gains, but [p. 934] they lost only slightly.

And, on average, if you look across all of them, you can find that there is a substantial gain since the institution of the K-4 Plan.

Q. Do you have an opinion as to what's responsible for the recent gains of black students?

A. I believe that the programs that I have described and have been described here in testimony in the last day or two are the reasons why students in these schools are gaining more than perhaps they have in the past.

Q. Do you believe that the neighborhood school program for grades K through four, in and of itself, in any way contributed to the gains made by black students?

A. I believe that it is one of the contributing factors. Yes.

Q. And do you also believe that the level of parental involvement may affect these scores?

A. Yes, I do.

Q. Doctor Walberg, did you direct the preparation of all of the graphs in Exhibit 185?

A. Yes, I did.

Q. Did you check the accuracy of the numbers?

A. Yes, I did.

* * *

[p. 942] Q. So the figures shown in the representation – the bar graph representation for King and Garden Oaks are losses. They're not lesser gains. They're losses.

A. Well, perhaps I should clarify this. This is gains and losses, or, I should say, changes in general relative to normal progress in school.

So I could say that all the students were making gains in some sense, because they learned something during the course of the year. But eight of the schools made gains that were larger than those of the national average and two schools made gains that were less than the average gains made in the United States.

* * *

[p. 944] Q. You are aware, aren't you, that in grades five through twelve the district carries out a mandatory busing program to maintain desegregation and racial balance?

A. Yes, I'm aware of that.

Q. So it's fair to say that an effective schools program can be carried out in a desegregated setting, and even in the context of a mandatory plan?

A. That's correct.

Q. And is it also true that the factors you identified as most strongly associated with learning, to the extent that they are under the control of or can be affected by school system action can be provided or enhanced in desegregated schools or in a system carrying out a desegregation plan? –

A. Well, I need to say that it's possible to do these things at the same time, but I also need to remind myself, or to give a full answer, that if there are expenditures involved, such as monetary expenditures for effective schools or for transportation, or if the district has a finite amount of energy and attention that they can give to things, if they are doing two things simultaneously one can take away from the other.

So, while it's theoretically possible to do two, three, or four things simultaneously, we do have to consider the amount of resources that are expended on each activity as well as the benefits involved.

Q. Well, you're not saying, are you, that if you were con- [p. 945] sulted by a school district that was carrying out a mandatory desegregation plan and wished to implement an effective schools program that you would suggest to them that they should dismantle their desegregation plan in order to implement an effective schools program?

A. No, I would not do that. I think they have to simply assess the amount of energy, resources, financial resources that they have and come up with the thing that's in the best interest of the children.

Q. Now, you said you thought there would be no effect on achievement from attendance at any of the more than 90 percent black schools next year. Is that –

A. Yes, I think that was concerned with the question whether the racial percentage would have an effect one way or the other.

Q. And did you mean to suggest in that answer a comparison with attendance at a, perhaps, majority white school?

A. Yes. I think I was being asked to illustrate the point that racial composition of the school, in my opinion, does not have a consistent effect on how much black students learn.

Q. But isn't it correct to say it would be difficult to determine the impact of moving from a school of – a more racially mixed school to one of these 90 percent black schools, for example, between the last year of the Finger Plan and the first year of the new student assignment plan, by looking at [p. 946] the test scores that have been made since then, because there were other changes in programs, such as the implementation of the effective schools program at the same time? I mean, we're never really going to be able to know for sure what was really happening, since the two changes occurred almost simultaneously in the district.

A. The two changes you are referring to are the reversion to the neighborhood schools at grades one through four and the effective schools program?

Q. Correct.

A. And I think I would mention, as well, the increased parental involvement at that point in time.

Q. Well, –

A. I think it's – I think it's difficult to give the exact weight, but I do think that there's been considerable research on effective schools in terms of involvement that suggests that those things would be conducive to achievement, so that if achievement had, in fact, gone down, then I think that that would be quite surprising.

Q. But the fact that achievement has gone up would not be conclusive. I mean, it would be theoretically possible, for example, that for students assigned back to heavily black schools, if there was a negative effect on achievement of some dimensions, it might be outweighed by the positive effect of some parental involvement and effective schools program, the [p. 947] factors that you've mentioned.

A. Well, in my own opinion, I think that the parental involvement and effective schools would lead to higher achievement, and I say that on the basis of my school visits and the interviews and the other studies I have made also, since there have been so many studies of this throughout the United States.

So I don't think we can be absolutely certain of anything in educational research, but I think that there's – I would have very strong confidence that the parental

involvement and the effective schools would be the two major causes of improvement.

* * *

[p. 953] THE COURT: Did you find any discrimination between whites and blacks in your study of the school system?

THE WITNESS: I did not.

THE COURT: Did you make a further study of whether or not this court should continue supervision of the school district?

THE WITNESS: I had only thought of that question since you raised it the last day or two, Your Honor, –

MR. CHACHKIN: Excuse me, Your Honor. Respectfully, again I object to the somewhat different question than the court has previously asked. I believe and I think it's very clear that that is a decision for the court to make to a legal issue in the case, and I don't think this witness is qualified to make it.

THE COURT: Well, I disagree with you on that.

And I think I should at this point – I haven't done it before, but it's been in the back of my mind.

The pretrial order, agreed to between the parties, paragraph 7 of the contentions of the defendant reads

* * *

RECORD, VOLUME VII

[p. 971] Q. Have you reached any conclusion?

A. Yes. I think segregated schools are harmful from American standards, are harmful to black students because they would inhibit their learning as reflected in the standard achievement test scores, and it would inhibit their ability to finish high school and to finish college. It reduces, somewhat, their political participation. Graduates of segregated schools have worse employment prospects.

You could also – the evidence would also be that white graduates of segregated schools are somewhat – have somewhat more difficulty in interaction, friendships, and conversation with blacks, and are somewhat more prejudiced.

I'd say those are the main factors that one should talk about.

Q. What is the basis for your conclusion that segregated schools have harmful academic effects and desegregated schools presumably do not?

A. Mainly, the META analysis that I did for – originally for the Ford Foundation and the later one I did for the National Institute of Education. The later one surveyed 93 different studies of desegregation achievement. Most of these were – many of these were doctoral dissertations written by school principals and school administrators around the country about their own school districts, and I analyzed these studies and found a pattern indicating that black students from segregated [p.

972] schools tended to score less well on standard achievement tests.

Q. Were the results of your analysis uniform?

A. No. there's a – there's been a clear discrepancy, because about half of the studies done show a sort of clear positive effect of desegregation, and the other half show essentially no effect at all. Occasionally a study will actually show there are negative effects of desegregation.

Q. You're talking about effects on what students?

A. On black students. On black student achievement test scores.

Q. Did you study the effects on white students' test scores?

A. No, I didn't. That question was studied several years ago by several different people. They always found that white test scores were not affected by desegregation, and I think, as far as I know, all sociologists and psychologists think of that as essentially a closed issue. No-one has studied it for the last ten years.

Q. So you were studying then the effects of academic achievement on – of desegregation on black students only, –

A. That's right.

Q. – and the results were not uniform?

A. That's right.

* * *

[p. 1003] Q. Doctor, –

A. Can you do this whole analysis a different way. what I've done here is to look at the same cohort as they move from one grade to another, but that means you're switching from one test to another.

A simpler method would be simply to look at the same grade and say, "This is a reasonably large school district. You wouldn't really expect the students who entered – who were, say, thirteen years old to be terribly different from the students that are twelve years or the students who are fourteen years old at any one time. Let's simply look at all the students who were first graders in 1984, all the students who were first graders in 1985, and students who were first graders in 1986.

Q. I was going to ask you about that, Doctor Crain. You have been talking about tracing cohorts through.

A. That's right.

Q. Now you're talking about comparing the first grade in one year with the first grade in another year, and then doing the same thing for other years.

A. That's right.

Q. For the grades rather?

[p. 1004] A. Yes, we're comparing grades. We're comparing different cohorts to each other.

If you do that, you get almost exactly the same pattern. For example, the first grade gap in the fall of '84 was eleven points, in the fall of '85 was eleven – the spring of '84 was eleven points, spring of '85 was eleven points, spring of '86 was fifteen points. The gap had gotten worse.

That's also true for the second grade, that's also true for the third grade. There's no difference in the fourth grade. It's also true for the fifth grade.

On the other hand, in the upper grades, six through eleventh, the gap got worse in 1986 in only two cases and got better in four cases. So, you see the same pattern again in the upper grades. There is improvement in the gap, declining. In lower grades the gap – the lower grades, the gap has gotten worse.

Now, this is not very strong evidence that Oklahoma City is following the national trend in which segregation is more harmful to achievement. I would expect that to be the case, but this is really not very strong evidence, because it's the first year of the plan, and students were moved around, teachers were moved around, and you would expect some amount of disruption.

The best I can say is that certainly the new effective schools program that I've read some literature about is working [p. 1005] in the upper grades better than it is the lower grades, and there's no evidence here that – that – at least I would not interpret this as giving any evidence at all to indicate that students are doing better because they're in a neighborhood school. You would have to say the students are doing worse. Maybe they'll do better in some future year, but they're not doing better not. They're doing worse.

Q. Doctor, you've indicated that the time which has passed between the implementation of the plan and now makes it difficult to do a definitive analysis and reach definitive conclusions.

A. Uh-huh.

Q. Would that be – is that your experience in other situations?

A. Yes. I have worked with achievement tests in a number of studies, and I've studied desegregation plans. You do want some time for things to settle down, and especially you don't want to compare two different tests. It's always very difficult. Well, you just don't want to do it. You can't do it most of the time.

* * *

[p. 1008] A. * * * If that's the case, then I would summarize these results as follows: They indicate that black families who live in racially mixed and predominantly white neighborhoods have children who score higher on tests than black families who live in the ghetto, and I would be absolutely astonished if that were not the case, and it has absolutely nothing to do with riding a bus.

This research is absolutely indefensible. No social scientist in the country would accept this as competent research. You have to control, you have to match students on their background characteristics and on previous ability, and every study that possibly could be published does that. You just have to do that, and this doesn't do it.

* * *

[p. 1011] Q. In your view, does this provision offset the damages that you have described?

A. No.

Q. Why not?

A. They simply – they simply operate at – it's a way of operating a segregated school system by inviting the black families to participate in the process of creating segregation so that it can have a sense of democracy about it. But it's not –

Q. What do you mean by that?

A. I mean, in a society where blacks have grown up treated unequally and been separated from whites, it would be astonishing to expect very many blacks to volunteer for the frightening experience of sending their child across town to an all-white school. It's – it's a burden, it's a lost less efficient that having bus that shows up to take all the kids, you have to separate your child from all his friends, and you have to run this risk of dealing with these whites on the other side of town. You can't expect black families to be willing to risk that.

Consequently, I think anyone who draws a plan which puts this provision in knows that only a tiny percentage will take advantage of it, and that most students will remain in segregated schools.

* * *

[p. 1019] Q. Doctor Crain, one more area of inquiry.

Do you advocate the same – Do you reach the same conclusions with respect to desegregation when it comes to choices regarding higher education?

A. No.

Q. Why not?

A. I think black colleges – I think it's a big mistake on the part of the Federal Government to – to press for

the total desegregation of black colleges, and I think the Federal Government learned that lesson and, in fact, has backed away from that position.

In a situation where college attendance is voluntary, there are some black students who would be very uncomfortable in a desegregated or predominantly white college and for whom a black college would provide a good educational opportunity for them.

* * *

[p. 1028] Q. My question to you is this: In your opinion, – I'm not concerned about someone else's opinion – is an urban community like Oklahoma City, through the implementation of a court-ordered desegregation plan, capable of eliminating residential segregation by itself?

A. Well, the school district wouldn't do it without the help of the City Planning Department, the zoning board, and all the – I mean, if the rest of the city wants the school system – if the rest of the city wants residential segregation, the school system is going to be swimming upstream. But if you put together a concerted effort over the next 50 years of –

I've written –

Q. Well, I think you –

A. – on exactly the things the school district could do to create residential integration, –

Q. I think you've answered my question.

A. Oh.

[p. 1029] Q. You've told me that, standing alone, a school district such as Oklahoma City cannot do that.

A. Okay.

Q. There must be significant effort from all other governmental entities in the community; correct?

A. That's right.

Q. And, in fact, do you know of any court-ordered desegregation plan in an urban community similar to Oklahoma City which has successfully eliminated residential segregation in that community?

A. I don't know any school district which has eliminated all residential segregation, however, I have been quite surprised in this research that I've done with Dianna Pierce and others about the impact in the change.

* * *

[p. 1066] Q. * * * would you agree that parental involvement in the schools has a significant impact on black academic achievement?

A. Yes.

Q. You mentioned the effective schools program, and I think [p. 1067] you indicated you didn't think that we have had time in Oklahoma City to see the results of that; is that correct?

A. Well, I don't know whether you have or not.

Q. Well, what did you testify on direct? Have you analyzed Oklahoma City's effective schools program?

A. No.

Q. So you don't now what impact it's having on academic achievement, do you?

A. No.

Q. Are you aware that this school district has a bilingual program?

A. I would – I would assume – I assumed it had one.

Q. Don't you think that can have a positive effect on achievement?

A. Yes.

Q. Now, we've been talking about achievement. Let's switch gears now and talk about the success of black students in adult life.

Would you agree with me that, besides racial balance in the school, there are a number of factors which can have a positive effect on black adult achievement?

A. Yes.

Q. What are those things?

A. Uhm, –

Q. Occupational training?

[p. 1068] A. Yes.

Q. Personal Character?

A. Yes.

Q. Socioeconomic status?

A. Yes.

Q. Parental support again?

A. Yes.

Q. There are a number of factors; right?

A. Yes. Yes.

Q. And, would you agree that blacks can achieve and become successful when these factors come into play even though they attend schools that are not racially balanced?

A. Yes.

* * *

[p. 1078] Q. * * * do I understand you correctly that when all factors remain constant that the racial balance of the school doesn't have an impact on black academic achievement?

A. I'll agree with that.

* * *

[p. 1093] Q. Well, can you think of any activity outside of school that would have a positive effect on blacks?

A. Sure. Playing games on the same team.

Q. Okay. Anything else?

A. Being in Boy Scouts together.

Q. Anything else?

A. Going to after-school tutoring together.

Q. Okay.

A. Going to church together, or Sunday School, I mean. Not church. Those are things that come to mind.

Q. So you will admit that there are interactions between black students and white students outside of the classroom which, in your opinion, are beneficial to the blacks?

A. Yes.

Q. And allow them to become socially acceptable when they – when they get out of school.

A. Let me just re-– I don't know quite what you mean by socially acceptable. You mean they've learned how to act so they're socially acceptable to white people? Is that what you meant?

Q. Well, that was a poor choice of words on my part.

The point I was trying to make is, as a result of this interaction, they could better socialize with whites when they become adults.

A. Yes, it would be helpful.

* * *

[p. 1097] Q. So all other factors that determine black adult success will be favorably impacted by virtue of busing the children between grades five and twelve?

A. That's correct.

Q. And there will be positive benefits sustained and received by those children at those grade levels?

A. That's right. I believe that's true. Yes.

Q. You also testified that, in your opinion, black – all-black colleges are okay.

A. Yes.

Q. And they produce some – some black scholars.

A. Sure.

Q. But you made the distinction that those are different from elementary schools because it's not mandatory to go to a black college. Is that what you said?

A. Yes. It's not mandatory to go to college at all.

Q. But it is mandatory to go to school.

A. That's right.

Q. Are you aware that in Oklahoma City it is not mandatory to got to a black elementary school?

A. Oh, yes. I know that.

* * *

YALE RABIN

[p. 1125] THE COURT: Wait, what's the number?

MR. CHACHKIN: Plaintiff's exhibit number 60.

THE COURT: 60?

MR. CHACHKIN: With the overlay, plaintiff's exhibit 58-A, over it.

Q. (BY MR. CHACHKIN:) Would you describe what this map is?

A. This map is the distribution of black population by block, 1970.

If I may, I think I should explain the notion of block so that it's clearly understood what the distinction is between a block and a tract.

A census tract is the largest, most conventional unit of data gathering which the census bureau uses, but each tract is divided, depending on whether it's in a rural or an urban area. If it's in a rural area, a tract is subdivided into what are called an enumeration district, an enumeration district literally being the area that's covered during the census by a single enumerator.

In Urban areas, the census tract is divided into blocks, and blocks are – generally correspond to city, individual city blocks, that is, an area of land bounded by four streets, or three streets and a railroad, or a river, but there are clearly evident boundaries to the block itself.

[p. 1126] So we're talking about a great many subdivisions within a census tract. There may be as many as 100 or 200 blocks within an individual census tract. So that this provides a far more precise indication of where people live within the tract than one which deals with the tract in aggregate.

Q. So that's –

A. So that this map then shows that distribution, population by race, by block, for 1970, with the color designations being precisely the same as they were on the 1960 map.

Q. And this map was prepared under your supervision?

A. Yes, it was.

Q. And have you checked it for accuracy?

A. I have. Yes.

Q. Are you satisfied with the work done by your graduate student?

A. I am.

Q. Would you briefly describe the distribution of black population in 1970 as shown on the map?

A. Yes. As the map indicates, there has been a very substantial increase in the area in which blacks live, and evidence of some dispersal of blacks to areas of the city in which they did not live before.

Most of the direction in which that change has taken place has been to the north and east, but there are some evidence of small changes that are taking place elsewhere.

[p. 1127] It may not be visible, but there are blocks in the southwest that now begin to show up as having more than ten percent black population in 1970.

But predominantly the growth is from the areas which were black in 1950. They have expanded in size, and that expansion has taken place largely to the north.

And the other change that I would note that's taken place is that there is also an increase in the intensity, that is, the degree to which the larger black areas are black. That is, one now sees much more extensive areas, both in what I will call the central –

Q. I believe it's been referred to as the northeast quadrant.

A. The northeast quadrant. And I don't know how the area further east is characterized, but both of them show more extensive areas in 1970 which are over 90 percent black than in 1960.

Q. I believe you said a moment ago that there was a change from 1950. The comparisons that you have been making are between 1960 and 1970 on these maps.

A. The earlier map was of 1960. This map is of 1970.

My reference to 1950 earlier was to some of the tract data which I looked at, and that – that information is not reflected on these maps.

Q. Let me change the exhibit to reflect the 1980 map.

Mr. Rabin, we have now placed on the easel underneath the [p. 1128] same overlay, which is plaintiff's exhibit 58-A, a map identified as plaintiff's exhibit 62. Do you recognize that map?

A. I do. Yes. This is the map of the distribution of black population by block for 1980. And, again, it uses the same color indications that were used on the 1960 and 1970 maps.

Q. And this map was also prepared under your supervision?

A. It was. Yes.

Q. And have you reviewed it for accuracy?

A. I have.

Q. And you are satisfied with the work that your student did?

A. I am. Yes.

Q. Is it an accurate reflection of the census information?

A. It is.

MR. CHACHKIN: Your Honor, at this time the plaintiff's would move the admission into evidence of exhibits 58, 58-A, which is the overlay, 60, and 62.

THE COURT: 58-A?

MR. CHACHKIN: Yes, Your Honor.

THE COURT: And this is 60 –

MR. CHACHKIN: 60 and 62.

THE COURT: You've got 60, 60-A, and 58-A, and 62?

MR. CHACHKIN: No, there's only one A. It's 58, 58-A, 60, and 62.

MR. DAY: No objection.

[p. 1129] THE COURT: Then let the record show these exhibits are all received in evidence.

Q. (By Mr. Chachkin) have you reached any conclusions about the pattern or population movement in Oklahoma City from 1960 to 1980 based on your review of the census materials, Mr. Rabin?

A. I have. Yes.

Q. Could you describe or state your conclusions?

A. I can, yes, but I would like, if I can, to go back also ten years, and, frankly, I did that in response to

reading Doctor Clark's deposition, and since he had looked at the population change beginning in 1950, I thought it would be appropriate if I went back and looked also, and so that I can include, in some or these conclusions that I've reached, what those changes have been.

If we go back to 1950, we can see that the black population in Oklahoma City has increased by two-and-three-quarters times between 1950 and 1980. The concentrated areas in which blacks live have also increased over that period of time in both size and intensity, and I think that might be best illustrated by looking at some of the changes which have taken place at the tract level.

If we take, as a reasonable indicator of concentration, – I don't think anybody would question the fact that a tract that was 75 percent or more black is a concentrated black tract. In [p. 1130] 1950 there was one such tract. That was tract 29. In 1960, there were six tracts which were 75 percent or more black.

In 1950, the tract that was 75 percent or more black included 24.9 percent of all blacks; that is, less than a quarter of all blacks who lived in Oklahoma City in 1950 –

THE COURT: 19-when?

THE WITNESS: In 1950, Your Honor.

THE COURT: Yes.

A. – Less than a quarter of them lived in census tracts which were 75 percent or more black. In 1960, that had increased to 69-and-a-half percent of all blacks. In 1970, that had increased to 73.3 percent.

THE COURT: 73-point-what?

THE WITNESS: 73.3 percent.

A. And in 1980, –

THE COURT: How many tracts increased?

THE WITNESS: Oh, I was just giving the population. I'll go through the tracts if you like.

THE COURT: All right. Excuse me.

A. In 1980, that dropped back to 60.8 percent.

Now, spatially, which is a major concern if we're dealing with the desegregation of schools whose locations are fixed by where they were built, the area of concentration has increased very substantially.

As I indicated, there was one such tract in '50, there [p. 1131] were six such tracts in 1960, there were 13 such tracts in 1970, and there were 16 tracts in 1980 which were 75 percent or more black.

Q. (By Mr. Chachkin) Now, did the tracts that were concentrated black, to use your term, that had more than 75 percent black population in them, always included the original tracts, or did they – the makeup of the group of tracts meeting –

A. By "the original tracts," I'm not quite sure.

Q. We start out with the single tract in 1950. Did that tract remain concentrated through 1980?

A. Yes. Yes. All of the tracts, I believe, from each previous decade are included in the group which has expanded during the succeeding decade.

Q. And you referred to the proportion of the population, of the black population living in Oklahoma City.

Are the boundaries of the city and the school district coterminous?

A. They're not, as far as I know.

Q. And do the boundaries of the – the boundaries of the city include some of the areas between the portions of the school district shown on the overlay?

A. I believe they do, but the boundary of the city is not shown on any of these maps. The tracts which I have named, though, are all included within the city.

[p. 1132] Q. Now, Mr. Rabin, you said you had read Doctor Clark's deposition. Are you aware that Doctor Clark testified in this case?

A. I am. Yes.

Q. Have you also read the transcript of his testimony last week?

A. I have. Yes.

Q. Do you recall his reference to 17 percent of the total black population in the concentrated area of black residences in Oklahoma City?

A. Yes, I do.

Q. Do you know what area Doctor Clark was referring to?

A. Well, it was that reference, frankly, which led to this analysis, because the impression one gets from reading the transcript, because the comment is made in a

rather out-of-context way, is that, at present, 17 percent of blacks live in the concentrated area, when, to the best I can figure, what he was actually referring to was the area in 1950, the single tract in 1950 in which, I think –

Let me see if I can find the figure.

Not the single tract. Excuse me. It was –

I've got it straight.

In 1980, in 1980, 16.9 percent of the black population of Oklahoma City lived in the six tracts in which they were concentrated in 1960.

[p. 1133] Q. And is that the same area of concentration that you have defined for 1980?

A. Oh, no. I mean, the – what was the area of concentration in 1960 is not the area of concentration in 1980.

I traced through all of the years the transition which had taken place in those tracts, but it's quite clear that the area of concentration itself has changed, and it's misleading to refer, in each successive decade, to the same six tracts as the area of concentration. That area was only the area of concentration in 1960.

THE COURT: Let me ask you, did you say the concentration was in 16 tracts or 6?

THE WITNESS: In 1960 –

THE COURT: '80. 1980.

THE WITNESS: In 1980, in 16 tracts.

THE COURT: 16. All right. That's what I thought.

THE WITNESS: Yes. One-six. In 1960, in six tracts.

THE COURT: Yes.

THE WITNESS: If you'd like, I can read –

THE COURT: The population that you're talking about, the concentration, and 16 blocks is what percentage?

THE WITNESS: No, these are tracts, Your Honor. In 1950, 24 –

THE COURT: No, no. I've got that.

THE WITNESS: Yes.

[p. 1134] THE COURT: I'm not clear on 1980.

THE WITNESS: In 1980, there were 16 census tracts housing 60.8 percent –

THE COURT: Of all –

THE WITNESS: – of all blacks in Oklahoma City.

THE COURT: How much? 60?

THE WITNESS: 60.8 percent of all blacks in Oklahoma City in tracts which were 75 percent or more black.

THE COURT: Go ahead. I'm through.

A. The – it's also, I think, important that the actual numbers have increased very substantially. In 1950, there were only 5,236 blacks living in this concentrated area. In 1980, there are 35,691 blacks living –

THE COURT: In 1980 there was what?

THE WITNESS: In 1980, 35,691 blacks lived in the 75-percent-or-more tracts.

THE COURT: In 1950 it was 5,000?

THE WITNESS: That's right. 5,236.

A. And the proportion of blacks in 1980 is about two-and-a-half times as great as it was in 1950 living in those areas.

Q. (By Mr. Chachkin) And, again, just so I'm clear, the area of concentration in 1980 continues to include within it or to subsume the areas of concentration in previous decades.

A. That's true.

Q. Do you know if the area of concentration in 1980, as [p. 1135] you've defined it, in the northeast quadrant, includes the area within which most of the schools that are now more than 90 percent black, the elementary schools, are located?

A. Yes, it does.

MR. CHACHKIN: Thank you very much.

CROSS-EXAMINATION

BY MR. DAY:

Q. Mr. Rabin, as I understand it, sir, you have a Bachelor's Degree in Architecture; is that correct?

A. It's a Graduate Degree. Yes. At that time, a Bachelor's Degree, just as a Bachelor of Law at that time, was a graduate – I guess you're a little young for that. But,

before degree escalation and they started giving attorneys JD's for what they gave them Bachelor's Degrees for before, they also gave Architects and Planners Graduate Bachelor's Degree.

Q. So what do you hold, Doctorate in Architecture?

A. No, no, no, no, no, no.

Q. Master's?

A. No. I have a Bachelor of Architecture. That's correct.

Q. Do you hold any postgraduate degrees?

A. I do not. No.

Q. And you are not a geographer?

A. No.

Q. And you're not a demographer?

A. That's quite true.

[p. 1136] Q. And you're not a desegregation planner, are you?

A. I don't know what that means. I have taken part in desegregation planning, but I don't know that there is such a –

Q. You don't hold yourself out as an expert in desegregation planning or preparing desegregation plans?

A. No.

Q. Do you have your vitae in front of you?

A. I do. Yes. I think so somewhere.

Q. As you were testifying, we were going over that, and I note that on 37 separate occasions that you had consulted or done work for the NAACP or the legal defense fund; is that correct?

A. I couldn't tell you. I –

Q. Does that sound about right to you?

A. I have no idea.

Q. Well, I don't think it's necessary for you to count them. It's in evidence.

But would you agree that you do a substantial amount of work for the NAACP legal defense fund?

A. I did, during the late 60's, a lot of work for them.

Q. Did you testify for the NAACP legal defense fund in desegregation litigation in the 1960's?

A. I did. Yes.

* * *

[p. 1153] Q. * * * is that an accurate statement of what was happening in those tracts over time?

A. I assume that it is. I mean, I –

Q. Mr. Rabin, are you aware that –

You've read the court's 1963 decision, have you not?

A. Parts of it. Yes. I have not read it all.

Q. Where the judge talked about the state-compelled system of desegregation?

A. Yes. Yes.

Q. And do you recall the court identifying the schools that were segregated at that point?

A. Yes.

Q. And those schools lie within those tracts on that exhibit, do they not, sir?

A. I believe they do. Yes.

Q. And, of course, if you read that decision, you're aware of the court's mentioning the Shelley V Kraemer decision which outlaws restrictive covenants?

A. I don't recall that. No.

Q. You don't recall that?

Well, can you understand why Doctor Clark concentrated on these tracts, the tracts that were identified as being the [p. 1154] segregated area as of 1963?

A. I'm afraid I don't.

Q. You don't.

A. No.

Q. Well, in 1963, none of these other 16 tracts you've been referring to, except for these, were predominantly black, were they?

A. That's correct.

Q. All of that movement and growth has taken place since 1960, has it not?

A. That's true.

Q. You're not aware of any action taken by the Oklahoma City Board of Education, are you, after this court entered its order in 1963, which caused or compelled blacks to be concentrated in these 16 tracts that you're talking about, are you?

A. Well, but there was a lot of public action. I mean, in tracts – the highway had enormous impacts in 29 and 38.

Q. I understand,

A. There was urban renewal in 26, 29, and 30. People did not simply get up and move.

Q. But my question was, Mr. Rabin, –

A. Many, many people were moved.

Q. My question, Mr. Rabin, was with regard to the actions of the Oklahoma City Board of Education. Are you aware of any action that the board took, after this Court entered its decree [p. 1155] in 1963, which compelled blacks to live in those tracts or any of the other 16 which you've identified as predominantly black?

A. I'm not. No. No.

Q. Okay. And I'm certain, as an expert in this area, you're familiar with the laws that have been passed across this country tearing down the past governmental barriers of discrimination, are you not, sir?

A. I'm familiar with the laws that have been passed. I'm certainly not familiar with them tearing down the barriers of past discrimination. They've outlawed many of the past discriminatory practices.

Q. They provide remedies for it, don't they?

A. And they have provided remedies. Yes.

Q. What factors do you believe determine where blacks in Oklahoma City live today?

Maybe I can go over these with you.

Would you agree with me that the preferences of black people, in part, are responsible for where they choose to live?

A. In some part.

Q. All right.

A. Yes.

Q. Okay. For example, the blacks that have moved out into these other areas that you showed ten percent or less, –

A. Uh-Huh.

Q. – that's most likely due to their preferences, is it not?

[p. 1156] A. I would assume so. Yes.

Q. And would you agree with me that their socio-economic level would play a part in where they decide to move to?

A. It would play a significant part in whether they could move to begin with.

Q. Yes. And also where they elect to move; right?

A. That's true.

Q. You said that you had seen no evidence that blacks within this area here had relocated.

A. Well, I – that's not what I said. I said it was not possible to determine, from the census data, whether a person living in a formerly all white tract, a black person living in a formerly all white tract, came there from an inner-city tract in Oklahoma City, or whether that person came from Los Angeles or Denver or Philadelphia. The census doesn't tell us that.

Q. Did plaintiff's counsel show you defendant's exhibit number 7?

A. No. No, I –

Q. That has been admitted into evidence, Mr. Rabin, –

A. Uh-huh.

Q. – As a map showing the relocation of black families from the northeast quadrant into other areas in the district. This particular map shows families with kindergarten children in school year 74/75 who, by 75/76, relocated.

A. Uh-huh.

[p. 1157] Q. And each line here has a number at the base, and that shows the number of families that actually relocated from this area out into these various areas.

A. I see. Any – Is there a total somewhere?

Q. You can add them up here.

A. Well, it looks like, – except for the two large arrows in the center, it looks like something substantially

under a hundred out of a population of many, many thousands.

Q. But doesn't this show to you that black children and families living in the Oklahoma City district have, in fact, left this northeast quadrant and moved out into other areas in the community.

A. I have no doubt that that took place.

Q. You said you had – you didn't have any evidence.

A. I said – Mr. Day, I – I said one could not tell from the census, that's all, and one cannot tell.

Q. But one can tell from the evidence, can't they?

A. Yes, or something like this.

Q. Now, this exhibit –

Let me back up just a moment.

While we were talking about 5-D, did you note this footnote that said the proportion of total Oklahoma City black population living in these tracts, 1950 was 82 percent, in 1960 was 84 percent, and in 1980 was 16.8 percent?

A. Yes. I determined those things on my own.

* * *

[p. 1159] buying homes. What the census tells us, the census asks a sample of people in each tract, first of all, whether they lived in the same house – whether they were living in the same house as they did five years previously. If the answer to that question is "no," it then

follows up with questions about whether their previous house was in the same city, in the same country.

* * *

Q. So this 42-percent turnover is not significant to you.

A. No. It would be significant, and I'm sure, knowing how careful Doctor Clark is, that if the data had indicated that these moves represented some substantial distance from where these people had earlier lived, he would have told us that.

Q. Mr. Rabin, how many of the 16 tracts which you identified earlier in your testimony are actually located in the Oklahoma City School District? Those are the 16 tracts that contain 75 percent, I think, of the black population in 1980.

A. I cannot answer that. I can give you the numbers of those tracts.

* * *

[p. 1191] But it's also true about these achievement tests. The scales aren't uniform. It's easier to gain at the lower level – lower part of the scale than it is the higher part because the items are easier.

So, in addition to the comments that were made yesterday about the – the norms on the tests which make it difficult to make year-to-year comparisons, I just noted that, also. Lots of schools are using these tests, but it's very difficult to know what to do with the results.

We all know that socioeconomic status is correlated with the test results, and sometimes I think the problem is that the tests are better at measuring socioeconomic status than they are at measuring achievement.

Q. So would – would you try to draw conclusions about the effectiveness of a program alteration that was made in the last year or two on the basis of –

A. I don't believe it's possible to draw conclusions like that.

MR. CHACHKIN: Thank You. You may cross-examine.

CROSS-EXAMINATION

BY MR. DAY:

* * *

[p. 1192] Q. Would you agree with me that no compulsory desegregation plan is designed to operate forever?

A. You're question is, is a compulsory desegregation plan designed to last forever?

My answer to that question is, "No."

* * *

[p. 1196] Q. Doctor Finger, would you agree with me that, when one is designing a compulsory desegregation plan, and particularly talking about pairing and clustering schools and busing children to and from those schools, that it's important to take the age of the child into consideration when formulating the plan?

A. Yes.

Q. And when you originally prepared the – your plan, which is called the finger plan, and it was approved by the court in 1972, you recommended exempting kindergarten students from busing, did you not?

I'm – I'm not quite sure exactly what my recommendation was. I've been trying to recall.

I believe that what recommended was that – an option be given, that the – either children could – either kindergarten children would be bussed or not, and it might depend upon the circumstances, whether it was an all-day kindergarten or a part-day kindergarten.

* * *

[p. 1198] Q. You're aware, of course, that in 1971 that the percent of black students in the district was 23 percent and that by 1985 it had increased to 39 percent, and that, on the other hand, white student population in '71 was 76.6 percent and by 1985 it dropped to 49.6 percent?

A. Yes.

Q. So we had – after the Finger Plan was implemented, we had a situation where the percent of black population within the student body was rising and the percent of white population was dropping.

A. Yes.

Q. And, in light of that change over time and demographic changes, do you feel that it would have been equitable to modify the plan to equalize the burden?

A. Well, I would have – I would have expected that – that the original plan would have been quite extensively modified. I – I didn't expect to find the fifth-grade centers still in existence. They were, I thought, something that was put in as kind of temporary thing.

I guess I would have expected to find that the fifth-grade centers had been incorporated into – into middle schools, and I was really surprised when I find that the fifth-grade centers [p. 1199] are being kept and moved out of the minority neighborhoods where they were originally put to provide some equity for the minority students. I was surprised about that, and I would have thought some steps were taken.

But then a lost of things happened that – that people didn't anticipate, that they – that our cities would become

more minority, that the birth rates would change, that the number of children – number of white children in cities would change. A lot of things have happened since 1972. The world today is not the same as it was in 1972, and – and very drastic changes have taken place, and I – I know it's been very difficult for the school board and the school department to contend with all of these differences that occurred, and – and I can see that these decisions are really tough. But –

So the question is, did I think they should have provided more equity, well, I would have thought they would have been looking for ways to make the whole system work more efficiently, so people would be more satisfied with it, so people would say, "Oh, our schools in Oklahoma are good? We're running good schools. We want to go to those schools." But I guess what happened was that the changes came about so fast people just couldn't do all those things.

* * *

[p. 1201] Q. Have you had the opportunity to review the stipulations and contention of the parties in the pretrial order?

A. Well, I – I'm not sure. Try me, Mr. Day. I may have.

Q. Well, let me try to simplify this, Doctor Finger.

In other words, are you aware that in the plaintiffs' contentions in this case, that they are acknowledging the [p. 1202] problems that the stand-alone concept created? Are you aware of that?

A. Yes, I am. I criticized them a little bit for that.

* * *

[p. 1207] Q. * * * Now, do you see any schools that are going to be 90 percent or more white next year on that page?

A. No.

Q. Do you see any schools that are going to be 90 percent or more white on page two of that exhibit?

A. No.

Q. So would you agree that there are no racially, as you put it, segregated white schools in Oklahoma City?

A. Elementary Schools. You had just asked me about Middle Schools and High Schools.

Q. No, those were Elementary Schools.

A. Yes, I know. I just wanted to clarify that.

Q. Okay.

A. When you said "Schools," and they talk about Elementary Schools there. My comment had to do with where these Elementary Schools get assigned at the –

Q. Okay.

A. – Junior High – at the Middle-School and High-School level.

Q. But do I understand you correctly that, in your mind and in your opinion, there will be no racially segregated white Elementary Schools next year?

A. Well – well, I just want to call your attention to the fact that we've changed the rules a little bit.

Q. How have we changed the rules?

[p. 1208] A. Well, we had been talking about percent black, and there will – now we're talking about percent minority. So we just need to make it clear, there will be – there will be a lot of schools in – in Oklahoma City next year that have less than ten percent black students in them, but there won't be any schools that have less than ten percent minority in them. So we should just be sure that we're talking about the same thing.

Q. Well, I understand what you're saying, and I appreciate it, and I happen to agree with it.

But my question, Doctor Finger, to you was that there will be no segregated white Elementary Schools next year.

Q. There will be no schools that have less than ten percent minority, but there will be schools that have less than ten percent black. How you label these as segregated or not is what the words mean, and segregated has always been a difficult word.

* * *

MARY LEE TAYLOR

[p. 1216] MR. CHACHKIN: Your Honor, we offer Doctor Taylor as an expert witness in social psychology and the study of race relations and racial attitudes.

THE COURT: Let the record show that Ms. Taylor is qualified in the subjects mentioned by counsel as an expert.

* * *

[p. 1225] A. * * * But I think the important point is that the – the Finger Plan did not eradicate the impact of the earlier official discrimination; it merely suspended it

by separating the schools from the residential situation. And now that the schools are linked again to housing, we have, again, the impact of the earlier official discrimination in the schools.

Q. But you – you did say that you were aware that there had been some shifts in the distribution of black population; is that correct?

A. Yes. I know that the black population has declined in some particular areas. I also know that black residents of Oklahoma City have moved into areas that formerly were entirely white, were virtually entirely white.

It seems to me an important point here is that the reciprocal change has not occurred. White residents of Oklahoma City have not moved into the area that was historically, traditionally black, and so the primary significance of the movement we've seen is that there are fewer black residents in the black residential area than there would have been had there not been some movement into white areas.

* * *

[p. 1229] Where Doctor Clark and I disagree is in our view of the genesis of the economic and – economic factors and preferences. He sees them, as I understand him, as incidental individual matters, and I think this view suffers from taking – from having a limited perspective on the impact of discrimination over time.

In fact, I think that economic resources and preferences are proximate causes of residential segregation, but they are also effects of past officially-produced residential

segregation. In that sense, they're intervening links. They help to explain why the black residential area, once it was created through official segregation, continues to exist even in the absence of continuing official action.

I think your question here is an important question because, once the black residential area in Oklahoma City was created, there are only – in fact, only two ways in which it could show fundamental change. One of those ways is if, indeed, there were a complete abandonment of the community, and I think this is unlikely to happen, and it's unlikely to happen, in part, because of the barriers to residential mobility among black Americans that I just described. For that abandonment to take place, there would have to – residential mobility would have to be a viable option for all [p. 1230] black residents, and I don't believe it is.

Q. Is there – I'm sorry, you said there are only – so that's – so that would be one of the ways?

A. That's right. One of the ways in which there could be fundamental change in the black community would be – would be for it to be abandoned.

The other fundamental change that might take place, in theory, is that white residents might move in. I think there's a lot of evidence that that is not likely to happen. We know that it hasn't happened.

Survey data shows that white adults are very sensitive to racial proportions, they are typically unwilling to go into situations where they will be in the racial minority.

Survey data was gathered late in the 1970's indicating that 84 percent of whites said they would not move into a neighborhood that had a bear majority of black residents, and the researchers that analyzed that data estimated that no whites in their sample would have agreed to move into an area that was virtually 100 percent black.

This kind of conclusion is congruent with other opinion, national opinion poll data. In my own data, white college students said they would not move into a predominantly black neighborhood even if the home involved was equal in its physical accommodations to what they could acquire elsewhere.

This unwillingness of whites to move into a predominantly [p. 1231] black area is often, in fact, taken as a given and used as the explanation for racial transition. It's assumed that whites will find the – find being in a minority so aversive that, once they fear they may some day be the minority in a transitional neighborhood, they will move.

I might add that the poll data shows that whites are more reluctant to move into a neighborhood within a given proportion of black residents than they are to stay in a neighborhood that attains that proportion of black residents. So most of the data that I rely on is conservative in some sense. I mean, it – as applied to the situation of whites potentially moving into a black area, we have to raise the percentages even more, although you can't raise – you can't really – there's already a ceiling effect.

With all – with all this evidence that white – white residents are not going to move into historically black

areas, it's very difficult to see where – how some transition to a racially mixed neighborhood would ever begin or continue.

Q. And when you were talking about the – what you referred to as the perpetuation of segregation phenomenon, I understood you to suggest that what Doctor Clark regarded as preference was tied to a history of official discrimination and segregation.

Is that also true of the – the white aversion that you've described to moving into established black neighborhoods?

[p. 1232] A. Yes, I think there's a lot of evidence that white attitudes about desegregation are, in fact, shaped by the history of segregation that those whites have been exposed to.

There's a well-documented phenomenon, called the fait accompli phenomenon in the literature. Public opinion shifts to follow existing policy, to accept existing policy as it continues, and public opinion, in fact, changes when policies and leaders change.

This can be a force for progressive transition, but in places like Oklahoma City, where the black neighborhood was created by state action, the involvement of public officials, the fait accompli phenomenon implies that white avoidance of desegregation would be particularly great for that reason. In other words, the official segregation encourages attitudes that segregated – segregation is appropriate, justified, that it's undesirable, in fact, – would be undesirable for whites to live in predominantly black neighborhoods.

Attitudes then are, in part, shaped by the institutional history, the history of official discrimination, and then, of course, those attitudes have an impact on future policy, they feed back in making it more and more difficult to change policy in the future.

The – we've certainly seen, in the case of segregated schools, that there was considerable white attitudinal resistment – resistance to change from segregated to desegregated [p. 1233] schools, and it took a lot of official action and continuing official action to remedy that.

* * *

Q. (BY MR. CHACHKIN) Doctor Taylor, I think when we broke you were discussing the extent to which white attitudes are tied to a background of official discrimination.

A. That's right. I had talked about the fait accompli effect and the fact that I believe white attitudes are, in fact, shaped by the history of discrimination.

I might note, in addition, this is another place where Doctor William Clark and I agree about some of the facts and do not share our perspective on those facts. We – we are in agreement that white preferences are a factor that will – that – a factor involved in explaining why whites have not moved into the predominantly black residential areaa [sic] in Oklahoma City.

[p. 1234] Where we disagree, I believe, is that Doctor Clark apparently sees those preferences as individual, incidental factors. I see those preference as being shaped by the history of discrimination in the area.

Q. Now, earlier, when you were talking about factors that limited residential mobility of blacks to leave the established black area, I asked you about the impact upon that of the years during which the Finger Plan was in effect here.

Let me ask you the same question with respect to white racial attitudes which you've said are heavily influenced by past discrimination.

What was the impact of the elimination of the current effects of that discrimination as the school enrollments, at least, during the time that the Finger Plan was in effect, did that – would that have been something that would have changed attitudes?

A. Well, of course, to my knowledge, we don't have evidence on – about the impact of the Finger Plan period on white attitudes in Oklahoma City. One would hope that it changed white attitudes about school desegregation to some extent.

It evidently did not change white attitudes about residential segregation enough that we have seen any tendency for white residents of Oklahoma City to move into that predominantly black area, and – and I think that that is not surprising, in fact, given the long duration of the official discrimination [p. 1235] that preceded the Finger Plan.

Also, it seems to me that the Finger Plan itself acknowledged that there were limits to the sort of overnight change that could be created in white attitudes in the sense that the schools in the black residential area were made fifth-grade centers. My understanding of that

is that it was anticipated that the white community would be more receptive to the plan if, indeed, the children at the younger grades were not assigned to those schools in the historically black area.

So in the Finger Plan itself there seems to have been some accommodation, some acceptance, if you will, of the limits of overnight attitude change among whites.

And you might notice – I've seen the data on requests for – the recent data on requests for school transfer, and, here again, we do not see large numbers of white parents requesting transfers for their children that might be transfered [sic] into predominantly black schools. Again, there's no evidence there of an accute [sic], positive impact of the Finger Plan history on white attitudes.

Q. You're talking about the exhibits that were presented regarding majority-to-minority transfers?

A. That's right.

Q. Let me ask you, in conclusion, if you could, just to briefly summarize again your overall view of the connection between the racial composition of schools in the northeast [p. 1236] quadrant today and the various kinds of discrimination that existed in Oklahoma City in the past and particularly prior to 1972 when the Finger Plan was ordered into effect.

A. To summarize, in 1965 the court noted that the segregated schools and residential area were a product of official discrimination. I believe that the segregation in the residential area has continued to show that impact of official discrimination. It's continued to show that

impact, in part, because of the barriers to black residential mobility out of the area, – I talked about that – in part because of white avoidance that itself was shaped by that institutional history.

During the – during the Finger Plan, in fact, the impact of that earlier official discrimination on the schools was interrupted, but now that the link between housing and schools has been resumed, in my view the impact of the earlier official discrimination is now reflected in the schools, as well.

Now, I think that the black children whose families have moved into what were formerly all-white areas will benefit from the desegregated school experience they receive.

I'm – I think it's fortunate that there are not more black children left in the predominantly black residential area to experience the segregated schooling that they will receive, because I think that those children in the 98 and 99 percent black schools in the – in the historic black residential area will suffer the same harms of the segregated schooling that [p. 1237] they had suffered before the Finger Plan was implemented, and I think it's a good thing that there are not more of them, that the mobility that's existed has moved some black children out of the area. But I think the number of children remaining in the area is too large. It's too large a number to be paying the price for official discrimination.

MR. CHACHKIN: Thank you, Doctor Taylor.

CROSS-EXAMINATION

BY MR. DAY:

Q. Doctor Taylor, when were you first contacted about testifying in this case?

A. I believe in mid-March.

Q. There past year?

A. That's right.

Q. When was your first trip to Oklahoma City in connection with this case?

A. This week. This week.

Q. This past week?

A. That's right.

Q. And when did you come in?

A. I – I actually spent a few days in the western part of Oklahoma. Flew into Oklahoma City on Friday, traveled out to the western part of Oklahoma for a couple of days, and came back here on Sunday. Uh-huh.

Q. Doctor Taylor, it sounds to me from listening to your [p. 1238] testimony that you have reviewed a substantial amount of the evidence in this case; is that correct?

A. I have – I have certainly reviewed some of the evidence in this case. Yes.

Q. And including prior case decisions and things of that nature?

A. Yes.

Q. You've reviewed the K-4 Plan, the Finger Plan, and those sorts of things; correct?

A. Yes.

Q. Based upon your educational background and your experience and your review of the facts in this case, you don't feel that the Oklahoma City Board of Education adopted this neighborhood plan with the intent to discriminate against blacks do you?

A. I have no evidence of that at all. I did not mean to suggest it.

Q. Well, in fact, when you gave us your deposition approximately one month ago under oath you told us that you found no evidence of intentional race discrimination; isn't that true?

A. I probably said I knew of no evidence. I stand by that. I know of no evidence of intentional – of intent to discriminate by the current school board.

Q. Yes. Okay. And I'm specifically referring to in the adoption of the 1984 K-4 Plan; okay?

A. Uh-huh.

* * *

[p. 1241] Q. *** based on your experience, you do agree that the extent to which responsible blacks are hired in top administrative positions over time can very well have an impact on the institutional racism concept that you've told us about.

A. I think it can. Yes.

Q. And would you tell the court how the placing of qualified blacks in upper echelon positions can have an impact on institutional racism?

A. I think that, in general, placing black individuals in positions of institutional responsibility, for one thing, sends out a message that that kind of position is appropriate and attainable.

It can – although it does not necessarily – it can also represent – bring about changes in institutional policy. There are all kinds of examples where, indeed, the incorpora- [p. 1242] tion of minority groups – blacks, other racial minorities, women – has brought about a change in the policy of institutions, and there are also a lot of examples where that incorporation has not brought about a change in the policy of the institutions. So I think that's by no means guaranteed, but it's a possibility.

Q. Well, it's more likely to help than not help, isn't it?

A. I think I would agree that – to that. Yes. Uh-huh.

Q. In your preparations for testifying in this case, were you told or did you read any information which showed that presently in Oklahoma City that there's a black man on the board of education that holds the position of vice-president?

A. I did know that there was a black man with the board of education. Yes.

Q. And did you know that there was a responsible black person. Mr. Vern Moore, filling the position of executive director of personnel?

A. I don't think I have known that until now.

Q. Were you aware that one of the assistant superintendents in the district is black, Doctor Betty Mason?

A. No, I've not known about the racial composition of the assistant – of the superintendent's staff.

Q. So I guess you weren't aware that as early as '71 and '72 and '-3 and '-4 that the Oklahoma City Board of Education placed responsible black individuals in upper echelon admini- [p. 1243] strative positions?

A. I simply had not looked at data bearing on that issue.

* * *

[p. 1245] Q. Now, if, Doctor Taylor, children in Oklahoma City have been bussed continuously for thirteen years into that area and without the result of increasing the white population in that area, would you agree with me that a school board, through the implementation of a desegregation plan alone, cannot bring about change to eliminate that residential segregation?

A. I would anticipate that there would have to be a number of institutional – official policies in addition to a school desegregation plan in order to substantially change an established black residential area that developed through official discrimination.

Q. And when you're talking about additional policies, you're talking about policies by other governmental agencies besides the board of education, aren't you?

A. Yes.

[p. 1246] Q. Now, do you have an opinion, if the court ordered the continued busing of children into that area, if that, alone, even if it were done indefinitely or in perpetuity, could integrate that area?

A. Resident – you mean residentially integrated that area?

Q. Yes.

A. I would not anticipate that a school desegregation plan, alone, would bring about total residential desegregation of an area that had been earmarked a black area during the years of official discrimination.

Q. And if I understood your testimony, you're telling us that there are a variety of factors, aside from action by the Oklahoma City Board of Education, which have had an impact on the patterns of residential segregation in this community over time?

A. Yes.

* * *

[p. 1255] Q. Well, the point I was trying to make, Doctor Taylor, is that in light of the M-to-M transfer option, if a parent so desires, they're not compelled to send their children to predominantly black schools in Oklahoma City today.

A. I understand that – that there is a formal opening for parents to enroll their students in schools outside the neighborhood and that some black parents have used that opportunity.

Q. So those parents are not compelled to keep their kids in predominantly black schools, are they?

A. Those parents are not.

* * *

GORDON FOSTER

[p. 1265] A. * * * The inequitable part that I would perceive at the introduction of the plan was the fact that all of the first-grade – or the fifth-grade centers who were in the black community and the white students, grades one through four, were able to stay in their home base schools for those first four years. Ordinarily when we do a plan we attempt to randomize that so that neither racial group will feel that they're being overburdened in terms of the grade level of which their children are sent away from their home base school.

In this particular plan, what happened was all the fifth-grade centers were in the black community, and all the one-through-four centers were in the predominantly non-black community. So, in a sense, that didn't really remove the racial identifiability of those schools, because everybody knew that fifth-grade centers were formerly black schools, and so that the – the fact that they were black schools carried over, I think, to some extent over that plan. So there was, I believe, some inequality at that point.

[p. 1266] Now, as the Stand-alone feature of the plan, of the so-called Finger Plan, developed those schools that were terminated as Stand-alone Schools over the period of the Finger Plan, I agree with the testimony by Doctor Muse and others that this would have tended to discriminate or be unequal – not discriminate, necessarily – but be unequal to black parents and children because, as a Stand-alone School was changed, – this has already been described in testimony quite a bit formerly – but as

Stand-alone Schools were changed, the black students who had been assigned for the first four years to those schools had to be bussed further distances because the – the schools which were really available were further away from the northeast quadrant.

Q. Let me interrupt you for just a moment. I believe you said – I want to see if you meant to say – I think you used the word "terminated." Are you referring to the introduction or the termination of Stand-alone Schools?

A. I'm talking about the schools that were closed after the plan was started that were Stand-alone Schools and then, because of racial differences, got to the point where they –

I'm sorry. Well, some were terminated, yes, in the 70's. I can't remember the exact figures, but I believe the Finger Plan started with something like nine or ten Stand-alone Schools. And when these schools reverted back to the K-4 or K-5 status, then the black children who were attending those [p. 1267] had reassigned to other predominantly non-black schools.

I'm sorry if I misspoke. I can't pick up the thread of your question.

The other problem that concerned Doctor Muse and the black community was the fact that this Stand-alone feature also contributed to lesser and lesser enrollment in the black schools, and there was imminent danger of their falling below the necessary enrollment to continue as functional elementary attendance centers, and so the black community was continually in jeopardy of losing the schools in their area in the northeast quadrant.

Q. Have you analyzed the – the results of the 1985 Student Assignment Plan adopted by the school district?

A. Yes.

Q. Do you have an opinion as to whether the district is being operated as a desegregated school system under that plan?

A. I do.

Q. And would you tell the court what your opinion is and the basis for that opinion.

MR. DAY: Excuse me, counsel.

Your Honor, I believe that calls for a legal conclusion for which this witness is not qualified.

MR. CHACHKIN: Your Honor, I think if the witness doesn't understand the question he can indicate that.

THE COURT: Yes. Overruled.

[p. 1269] A. * * * Now, if you look at the current year, 1986/87, the ten highest percentage black schools in enrollment, of course, averaged 99 percent black. The faculty assigned to these ten highest percentage black schools in enrollment came out at 48 percent black.

So what we had was, in two years after the introduction of the '85 plan to go back to neighborhood schools, the faculty also increased in the highest black schools 17 percent black.

By contrast with that – and you get an idea of the disparity if you look at the ten lowest percentage black

schools in enrollment in 1984/85 before the plan. Their enrollment averaged approximately 20 percent black. The faculty assigned to those schools was 24 percent black, which is about six percent beneath the black schools, and the next two years, for the current year, 1986/87, the ten lowest percentage black schools in enrollment dropped from 20 percent black to six percent, and the faculty assigned also dropped from 24 down to 20, which means that, essentially, that under the 1985 plan implementation, the blacker schools in enrollment became much blacker in percentage black faculty, while in the schools with the least black enrollment, the faculty becomes [p. 1270] less black.

Q. Are those findings consistent, in your opinion, with the operation of a desegregated school system?

A. No.

Q. Andy why not? What – what are the conditions that –

A. Well, one of the factors which makes you desegregated or segregated is your faculty assignment or your faculty composition in each school as well as your student assignment or your student enrollment, and, to the extent that faculty becomes – a school is racially identifiable by virtue of its faculty assignment, then this further makes the school segregated or desegregated. And I'm simply saying that there was a trend, since 1985, for this to become more of a problem.

* * *

[p. 1275] Q. And again, I just want to be sure it's clear for the record, you're satisfied that the exhibits

accurately reflect the date from the sources that are identified in the exhibits.

A. Yes. I checked those.

Q. And you received those exhibits from counsel?

A. Yes.

* * *

Q. (BY MR. CHACHKIN) Now, Doctor Foster, you – in describing the last four of those exhibits that dealt with faculty, you talked about patterns of assignment.

You've been here through the defendant's testimony concerning the new board policy in administrative procedure concerning faculty assignments and affirmative action goals at [p. 1276] individual schools; is that correct?

A. Yes.

Q. What's your opinion concerning the new policy and procedure in light of – how is that going to affect the patterns that you've noted in your own analysis?

A. In my opinion, if these are followed out in a fairly short time, they should be productive to the extent that all schools would – would be in line.

Pardon me a second while I get my file.

According to the policy in the affirmative action plan, my understanding is that their goal – which is a goal and it's not a quota or anything – is based on having 36.9 percent black, and then assignment – and evidently both assignment and employment would be based on that,

with a leeway of plus or minus ten percent in terms of compliance.

I'd just simply like to comment that I think the assignment part will be a little more difficult, because their labor force right now at the elementary level, for example, is only around 30 percent, or a little less, black, which means that you have a gap there of about seven percent, which makes getting the schools in compliance a little more difficult.

Other than that, I think if the personnel services as the board adopted the policy signs off on all transfers and employment and they won't approve them unless they're in line with the goals that are outlined in the policy, it should work [p. 1277] out.

It's not that far off as it is right at the moment, but there are trends and discrepancies that have been obvious the last couple of years.

* * *

[p. 1278] A. All right. I prepared an initial draft of a plan which was finished about the 15th of April, and this had both plan A and plan B in it, and, since we were under time constraints, I simply did this in longhand and sent a copy to New York, and I understand it was then transferred to – a copy was sent to Oklahoma City.

The major purposes of the plan as requested by the plaintiffs were to be more equitable in terms of the burden of busing; to desegregate all of the eleven predominantly black schools, the ones that were 90 percent, if that was feasible; and to eliminate the stand-alone schools, in terms of the concept of stand-alone schools, as much as

possible, that feature of the finger plan that seemed to have difficulty.

Then I set out certain criteria to be followed, which are contained in the desegregation proposal, which is plaintiffs' Exhibit 57. Those include the usual type of criteria that you make for developing a plan.

For example, "A" says that kindergarten students would not be included in re-assignments. "B" says that the six elementary schools located in the discontiguous Arcadia and Star Spencer areas would not be involved in student reassignments. An attempt to would be made to treat reassignment and transportation of students at different grade levels equitable.

Long-accepted techniques for desegregation would be [p. 1279] utilized, including pairing and clustering, which, or course, would involve transportation.

That the grade structures in the plan would be based on an even split, which was either K-2 or K-3 and -4, or with the schools that were not reassigned would be left as K-4 schools. So, in other words, all schools would be somewhere within the framework of a K-4 situation except some of them would be only two grades and kindergarten.

Another criterion was that I would not attempt to do anything about closing schools, although it appears that there is capacity enough in the district to probably close some more schools. I considered this a problem that was – I should not be involved in. That's a board decision, and we would simply take the seven schools that were originally proposed, originally eight, because Edgemere

was in the original list, and operate on the basis that those would be closed, and that was it as far as closing.

And then transportation should be minimized as much as possible, which is always a part of a plan, and it should be – in terms of time and distance, should be feasible, that is, in legal language of the court, it shouldn't be so far or so long as to be detrimental to the student's health or educational well-being.

Okay, then with those criteria, and understanding the purpose of the plan, I developed the first draft, which I said [p. 1280] was in longhand.

Shortly after this, I think about a week later, I received from the plaintiffs' attorney three suggestions for my consideration in the final planning. One was that Zone 910-B, which is a noncontiguous zone to Columbus, be reassigned back to Rockwood. This zone contained – it's really a subzone – contained 32 black students as of last year, 14 non-black, and 13 kindergarten. And the suggestion was that if you paired or grouped Columbus the way it was set up, you would be sending black children, predominantly black children – I want you to understand it's a mixture, because 32 black and 14 non-black is not all black – but you would be sending a group of predominantly black students to a black school in a grouping situation.

Then another suggestion was that the Coolidge-Polk Fair be changed to Coolidge and Edwards, and the suggestion – the reason for that was that you would save them approximately a mile in terms of transportation, because if you look at the northeast quadrant, the Polk

School is about a mile or so north of Edwards, and this would make the pairing a little closer.

And then, if you did that, you would have to change the grouping of Lee, Wheeler, and Edwards, which was in the original document, to Lee, Wheeler, and Polk. So I took those under advisement.

Then in April 29th, 30th, and March – or May the 1st, I [p. 1281] came out to Oklahoma City for the second time – I'd been here earlier for three days – to specifically check the time and distance of these clusters, which I did, and I have a complete record of each cluster in plan A, and most of them in – the longer ones in plan B, in terms of how I got from one school to the other and what the mileage was and what the travel time between the two schools was, and I will talk about that later when I discuss the transportation called for by the plan.

While I was here and went from one of these schools to the other and looked again at the distances, I decided that the suggested change from Coolidge-Polk to Coolidge-Edwards, which, of course, also involved the Lee-Wheeler-Edwards cluster in the first plan, was a reasonable one, and I went with that in my revised plan.

In the meantime, the decision – about that time. I don't know the exact date. – The decision was made not to close Edgemere, and the first draft of the plan had been based on closing Edgemere. So we had to readjust the figures for that.

What this involved, in keeping Edgemere open, was to change the Monroe-Putnam Heights-Horace Mann cluster, which was in the first plan, to a pairing between

Monroe and Edgemere, and in both plans A and B this left Putnam Heights and Horace Mann, K-to-four schools and no reassignments in either one.

Then these changes were made, and on May 5th, I believe, [p. 1282] the second draft was completed, and somewhere around – by June the 12th, I had made a final and revised check of all these figures of the second draft. I had corrected the mistakes in them, and there were some in terms of the closing numbers, and I'd added, I think, three or four pages of explanation.

* * *

[p. 1298] What happens under the consummation of plan A in terms of totals, you start with eleven black schools with a one-to-four enrollment of 2,445 blacks, which represents 46 percent of the district total in grades one through four, and that's a fairly heavy concentration in a segregated school. You reduce this under plan A to one black school with a one-four enrollment of 315 pupils, and that is Parker.

So what you're left with is that only six percent of the black children in grades one through four are still in virtually all-black schools.

You also, by plan A, desegregate Western Village from 67 percent black to 45 percent black.

You desegregate North Highland from 90 to 49 percent.

Edgemere, which essentially is close to being racially non-identifiable already, is put in better racial balance from 53 to 36.

And Wilson, which was included originally for reasons I mentioned about Edgemere, is changed from 51 to 29.

In the Northeast Quadrant, you had eight black schools which were 99 percent or more. They're now, under plan A, 26 to 49 percent black.

* * *

[p. 1312] Q. Would you tell us what that estimate is?

A. The continuing costs I estimate, using the board's figures for cost items, only using 85 buses instead of 125, would be $982,712.

The initial cost – and it all depends on the accounting figures you use, but I think it's unfair to say that it costs five million dollars the first year, because I realize if you go out and buy the buses, you have to either borrow five million dollars, or whatever it costs, or have the money in the till, and the common way to do this, though, is to amortize it, as they've done in continuing costs. And all I'm saying is you do – if you buy all new buses with cash, or however you do it, you do have a start-up figure which would be their figure of 5,400,000. By my way of reckoning, reduced from 125 to 85 buses, which would be a factor of .68, which would run you out around three-and-a-half million, something like that.

In any event, the only difference, if you amortized the costs with the first year instead of counting the lump sum, you would have routing costs initially of something like 13,500, which is in their figures, and I can understand that. Except for that, –

Well, the routing costs go on year to year, according to their figures, but they also have the first year – well, the figures are changed, but initially they had $910 for recruitment, training, and drug testing of new drivers. I [p. 1313] think that's a – certainly a legitimate cost, and they've included that in their other figures for the second revised document.

So, essentially, what we're talking about is continuing costs using board figures, with a different number of buses, or $983,000 a year, roughly, and the first year costs, without the new buses, would be $1,060,000. You can treat the costs of the new buses any way the district does that. I don't know how they – how they operate that.

* * *

[p. 1351] Q. * * * weren't you surprised when I told you there were no 90 percent white schools in Oklahoma City?

A. I can't remember. I might have been.

Q. Question on page –

[p. 1352] A. But I agree that there aren't any. I mean, I've sat through the testimony several times.

* * *

[p. 1367] Q. You don't feel that they are more susceptible – you know, they're not fully developed.

A. I don't feel anything at all to that extent. I think that young children, in many cases, weather the busing much better than some of the older children.

Q. Well, let me – let's change the subject.

Are you aware, Doctor Foster, of any compulsory desegregation plans in the United States which exempt first and second graders from compulsory busing?

A. I think in the testimony this week somebody said that Dallas now exempts first and second grades, maybe third. I can't remember. But –

Q. I'm asking for your opinion.

A. Well, I don't know. As a matter of fact, I worked as a witness in the Dallas case, but that's happened since I was there, and I haven't seen the latest revision.

Q. You were –

A. I mentioned in my deposition that there were two that I understood, but I didn't know for a fact. One of them, I think was Tuscaloosa, Alabama, and the other one was probably Richmond County, Georgia.

[p. 1377] Q. Well, let's look at Quail Creek.

A. All right.

Q. That's the first pair in the northwest area. You show six percent black, and it was actually 13.1 percent black; is that what you find there on Exhibit 64?

A. That's right. And both figures would be racially-identifiable white. Or non-black, I'm sorry.

Q. Okay. Let's talk about the cluster involving Gatewood, Hawthorne, and Wilson. It's cluster four on page 12.

A. All right.

Q. Now, there you have – you're not clustering these schools with a 90 percent or more blacks school, are you?

A. No.

Q. And two of these schools, Gatewood, which is 29 percent black, and Wilson, which is 51 percent black, fall within your own definition of non-racially-identifiable schools; is that correct?

A. That's correct.

* * *

RECORD, VOLUME IX

[p. 1387] Q. So if the faculty at any school then is between 26 percent and 46 percent black, the Board's in compliance with its affirmative action policy.

A. That's right.

Q. You indicated, I believe, that you thought the goal set by the Board was rather high, in that the goal was 36.9 or -8, or whatever you said, and actually, at the elementary level, there were only –

What percent black teachers?

A. Well, I think it's around 30 percent, but I didn't – I don't believe I said it was rather high. I just said it was a little more difficult to get into compliance if your goal is six or seven percentage points higher than the actual number of teachers.

Q. Well, do you feel that's an admirable goal, I mean, to set it higher than the number of teachers you have –

[p. 1388] A. I have no problem with that.

Q. – for the purpose of recruiting minority teachers into the district?

A. Right.

* * *

Q. Now, in your preparations for this case and your review of all of the evidence and considering all of the testimony you heard while you were sitting in court over the last seven days, you have seen or heard nothing

which would indicate to you that the faculty assignments for 85/86 and 86/87 resulted from an intent to discriminate on the part of the Board of Education.

A. I wouldn't say so. No.

[p. 1389] Q. You wouldn't say so what?

A. That it had a tendency to discriminate. They simply slid a little during that period, and, as I see it, the Board is now getting them back into shape.

Q. But do I understand you correctly that in your opinion the Board took no action that discriminated against the faculty to bring this about?

A. I would say so, yes, that they didn't.

* * *

CLARA LUPER

[p. 1403] Q. Did you observe any harmful effects of busing on your child?

A. Of course not. My child was excited about riding the bus, because it's something about riding a bus that's exciting. Now, those of you that have never walked to school cannot understand what I'm talking about. It's a matter of learning even while you're riding a bus. Shelley read signs, and what have you. Yes.

Q. Did she suffer any negative academic effects from riding the bus?

A. She has just received a letter from her Superintendent of Schools, Doctor Steller, in which he congratulated her for her academic achievement on her test.

She is now participating in a program known as JIM at Northwest Classen, and most of all, she participated

recently in a pageant with teenagers from 13 to 17, and on July the 19th, she will be going to the Virgin Islands, where she will represent the State of Oklahoma.

Not only that, in the sixth grade, under her teacher that she loved so dearly, she won the History Fair and became the only student in the Oklahoma City School System to represent Oklahoma in Washington DC at the History Fair.

* * *

[p. 1412] One ol [sic] them is that there were burdens on black students under the Finger Plan, that is, disproportionate burdens of busing.

Are you aware of those disproportions in busing?

A. Yes, I am aware that there were more blacks bussed than whites.

* * *

Q. (BY MR. SHAW) And what was your view of the equity of those burdens, or the distribution of those burdens?

A. Well, I felt that if it was okay for black children to be bussed, it was certainly okay for whites, because, to me, that's – what's good for the goose is good for the gander.

Q. Well, in light of that, do you think that the school board's proffered reason for the – for going to the Neighborhood School Assignment Plan, that is, leaving the burden of busing on black children, justifies –

A. No, I – no, I don't.

Q. Why not?

A. In the first place, if we are talking about relieving the [p. 1413] burden of children, then I feel that the Board of Education should have looked at the reasons and tried to find –

Just like you do when you go to the hospital, something is wrong with your hand, you don't work with anything but the hand.

And if the problem was busing, then I – and this is certainly my thinking – I thought that the Board of Education should have done some studies and should have done some extra work on how – what kind of plan they could work out where both races of children would have the opportunity to bus.

Q. Now, Mrs. Luper, one of the other reasons that they proffered in support of the plan is that there were benefits of neighborhood schools, and, in particular, that the neighborhood school assignment plan would help academic achievement, – you've spoken to that already, I believe – and it would increase PTA/PTO involvement.

Do those reasons, in your view, justify the implementation of their plan?

A. I was invited as a guest at the Longfellow PTA meeting last year. There were eight parents there.

I went to Jefferson Middle School, and some techniques had changed. For example –

Q. When did you go to Jefferson?

A. I went to Jefferson early last year. Probably October. I don't know. During the last school year.

[p. 1414] I noticed – I mean, at Jefferson Middle School, they sent out invitations to the parents about open house and PTA, or PT – PTA.

I went to Jefferson on open house, like hundreds of other people, to see about their kids. That's the number one. While we were there, the PTA representatives were in the halls, and we paid our membership dues.

But since that day, I have not received one letter or one note stating that there would be another PTA meeting. I have been –

Q. I take it then that you are listed somewhere as a PTA member though.

A. Oh, I'm a PTA member, not only there, but some other schools.

I have a granddaughter in Harrison School, and I think they have a very effective PTA. But it's mixed in with school activities.

The same way mine is at John Marshall. We took out PTA memberships at open house, which was an advantage.

Q. Was that done prior to the implementation of –

A. Yes, we have always done that, so we've always had large memberships.

At Edwards Addition, I've been told by Mrs. Hunter, who had some children there, that –

MS. JONES: Objection, Your Honor. That's hearsay.

[p. 1415] THE WITNESS: Oh, okay. You're right.

THE COURT: She's through now. Go ahead.

Q. (BY MR. SHAW) Now, during the presentation of the school board's case, the school board put on a number of black school board employees, and counsel for the school board would ask them, "As a black person, do you think the school districts plan is discriminatory?" And they said "No," And – or whether the school district was unitary, and they said "No."

Are you aware of the various positions taken in the black community on the Neighborhood School Assignment Plan?

A. Yes, I am.

Q. What is your understanding of those positions?

A. Once again, those positions are based on who you're talking to. Throughout history, we have had people that have always been able to correct – to protect their interests.

I noticed with a great deal of interest the employees of the Board of Education that were – that have testified here, but I have also noticed that those employees have never been involved in anything in this city to change conditions of black people. Now, I've noticed that, and that's really important.

The attitude of people in this community, first, was neighborhood schools. There were a lot of people that did not understand that their children were going back to predominantly an all-black school.

* * *

MELVIN PORTER

[p. 1431] Q. Senator Porter, the school district has proffered a number of reasons that they have implemented the Neighborhood School Assign Plan grades K through four. I want to just take you through those reasons and ask you a few questions about them.

One is that they will relieve the burdens on black school children. In your view, does that justify the implementation of the Neighborhood School Plan?

A. No.

Q. Why not?

A. Well, black children have basically always had a burden. When they talk about the burden of busing, I think that it's unfair to put the entire burden of busing on the shoulders of the black youngster.

I cannot believe that this school board cannot come up with a plan that would call for the integration of a total system. They're dealing with less students than they've ever dealt with before. They certainly have the same tax base that they have had from the inception to generate funds and support their school system. There does not appear to be any reason that they could not – to say that busing, itself, is a burden appears to be a rather ridiculous argument.

I don't know of black parents that are up in arms and alarmed about the busing. Of course, many people would like to [p. 1432] take the line of least resistance and say, "I've got my boy walking across the street to school." But my children were bussed, and it was not that much of a burden.

We have never had, in this community, any hue and cry in any organizational meeting or structure from black parents who were screaming out the busing issue. I think that has been blown completely out of proportion.

Q. Well, there were people in the black community who are concerned about a one-way plan, –

A. Yes.

Q. – Weren't there?

A. Of course.

Q. And there were people concerned about the threat of school closings than the black community?

A. Of course. And let me address that issue.

In almost every single community in this state where integration has taken place, the black schools, particularly in the smaller cities, McAlister, Lawton, Muskogee, Okmulgee, many of these are areas of the state, have closed.

Now, what does that do? That hurts that community. I'm talking about the black community. You don't have an educational facility there. The buildings are dilapidated. They're either sold off, they're – they're used for community centers, and then shortly they're completely abandoned altogether.

[p. 1433] That's the feeling in the black community here in Oklahoma City. We don't want to see schools closed. We want to see schools kept open, and the – the threat of the present plan to the black community was that these schools, in fact, would close unless we

accepted that plan, and that was – that was of great concern.

Q. Senator Porter, the school board has said that there are benefits to neighborhood schools, one of the benefits they proffer is that there will be increased academic performance on the part of students who are not bussed.

Do you think that that rationale justifies the implementation of the K through four neighborhood school assignment plan?

A. I do not. I think it – rather, I think it indicates that, you know, a good teacher ought to be able to teach students whether they are bussed or whether they are not bussed.

Are they saying that because a child gets up 30 minutes earlier or an hour earlier that their learning process has slowed down?

Children are bussed in the Mid-Del School System, they are bussed in the Edmond City School System, they're bussed in Putnum City. I see big yellow buses running all over this county. Are they saying because those students are bussed they can't learn? I can't believe that that has any validity to it at all.

[p. 1434] Q. What about the rationale that PTA/PTO involvement will increase? Does that justify implementation of the Neighborhood School Assignment Plan in grades one through four?

A. Well, I don't think it does. As a matter of fact, from what I have been told by people within the Oklahoma City School System, I'm talking about their personnel, PTA's functioned when this plan – when Judge Bohanon's decision initially was put into play, it functioned very well.

For example, at – I believe it's the Edwards School where – where I lived, and I lived in the Edwards Addition. In talking with Mr. Cudjoe, who was the principal of that school, he indicated to me that they had very wide-range participation. White families were coming into the black area, for several reasons, from what we were told.

They were coming, number one, to see whether or not there were the proper tools and equipment and teachers there to teach their children.

Number two, they were coming because they wanted to make sure that their children were safe in, quote, an all-black community environment, and indicated that their participation was somewhat greater than that of the participation of the black parent, because the black parent did not have some of those fears.

* * *

WILLIAM ALFRED SAMPSON

[p. 1454] Q. And, for the record only, Doctor Sampson, you are a black sociologist; is that correct?

A. I am black and I am a sociologist.

Q. All right. Thank you.

Specifically, have you studied the factors which impact on academic achievement for children, particularly minority children?

A. I've – yes.

Q. In your professional opinion, and given your training, experience, and research studies, what do you think are the best predictors of academic achievement in children?

A. Well, there's a simple answer and a complicated answer.

The simple answer is that the single best predictor of academic achievement is some measure of socioeconomic status.

The complicated answer is that – has to do with the reality that we don't always measure socioeconomic status correctly.

There are two major bodies of thought on academic achievement and effective schooling. One is labled [sic], sort of loosely, the effective schools research, which essentially says that things that go on in schools determine academic achievement, and that the things that occur outside of school, particularly with respect to family background, and for sociologists that would include socioeconomic status, don't have much impact on the quality of education. That research also rejects the [p. 1455] notion that race has much of an impact at all on the quality of education.

The second body of research is more family based and talks about those variables or qualities of the family that have an impact on education and, to some degree, rejects the notion that what goes on the [sic] school is completely responsible.

So, at first glance, these two major bodies of thought on the question conflict, and both suggest that socio-economic status is – is not all that important.

The reason that they end up suggesting that is that the sociologists and economists have measured socio-economic status in the most convenient way; that is we've used education, occupation, and income because they're quantifiable.

But the reality is that a better measure has to do with many of the same kinds of variables about which Mr. Porter just spoke, and it turns out that research tends to indicate that kids who do best in schools are middle class students, though they may be poor; that is, that class is not as closely tied to income as we might have imagined, and a middle class family is a family in which there is strong authority, there's strong discipline, there's strict monitoring of the child's use of time and space, there's consistent praise for jobs well done, there's consistent parent-child interaction. And it turns out that those qualities can exist and have historically existed across the economic spectrum.

[p. 1456] So when you define class that way, though it's more difficult to measure when you do it that way, when you define class that way it turns out that a class is an absolutely crucial variable in predicting achievement, and certainly much more important than – than race.

Q. In fact, Doctor Sampson, I think those types of values you're discussing were things that both Mrs. Luper and Senator Porter pointed out in their own background.

A. Yes. Precisely.

Q. And you stated that these values are not really linked to income; is that right?

A. It's certainly easier to maintain them if you have more money, but it's obviously not impossible. If that were the case, then no generation of Americans would have ever gotten out of poverty, and generation after generation of Americans have gotten out of poverty. One of the basic reasons for that is, to a considerable degree, those that got out maintained those values.

And if you look, for example, – I'm beginning some research that looks at why a group of six all-black parochial schools in Chicago are so successful. The high school dropout rate in Chicago public schools is 65 percent. These six schools send 80 to 90 percent of their kids to college, and they're serving the same population.

Q. And did I understand you to say that those are all black?

[p. 1457] A. All black.

Q. Parochial schools?

A. Hundred percent black. And only about half of the students who go to those schools are Catholic. Many of them aren't.

And so we're beginning to look at what those schools are doing that – that produces that kind of achievement that the public schools in Chicago aren't doing, and there are several things.

One is it turns out that those schools have those characteristics that are most often associated with effective schools, the so-called effective schools; that is, they have less tracking rather than more, they have a strong principal, that their teachers have a great deal of access to outside-of-classroom materials, there's more emphasis upon the teaching of social studies rather than on math. All of those are characteristics.

If you look at the Ron Edmonds, Larry LaZant work on effective schools over the years, the characteristics of effective schools, and it turns out – by the way, strong discipline – and it turns out that those parochial schools have all of those things.

In addition to that, there's some self-selection that goes on. They tend to bring in these middle class families that are, in fact, poor, because those families want their kids to [p. 1458] get that kind of education, but those are precisely the kinds of families who would work well in any school system.

Q. Now, are those six parochial schools affluent schools?

A. No, they're all very poor. They're all in – in very poor black communities.

Q. So do I understand you to say that this set of values which is a good predictor of academic success does not depend on economic lines; is that correct?

A. No, it does not.

Q. Does it depend on racial lines?

A. Not at all. And to argue – I would suggest that to argue that it does is a racist argument.

Q. I guess my question, Doctor Sampson, is: In your opinion, do black students need to be in a classroom with white students to learn effectively?

A. Not if learning is what you're talking about. It has nothing to do with learning. If you were to go to Chicago and talk to these – or Milwaukee or a variety of other cities where these parochial schools are doing quite well and ask those little black kids, who are going off to Harvard and Yale and wherever they are going off to next fall, how concerned they are with integration, they would tell you "not at all." The school has worked very well for them.

* * *

[p. 1461] Q. How does education fit into diminishing or totally ridding the society of that disparity?

A. Well, if you look, the average black female college graduate earns 105 percent of what her white counterpart earns. That means that black female college graduates are earning more than white female college graduates.

The average black male college graduate earns about 84, 85 percent of what his white counterpart earns. That suggests that there is some discrimination in – in the marketplace.

But we're talking about college graduates; that is, both black and white have the same credentials, and there is somehow a discrepancy in payment and/or promotion.

Q. Would you be concerned about students being harmed in a classroom that was 90 percent or more black if there was an effective schools program?

A. If – if the purpose of the schools is education, then the answer is "no."

Q. And, in your opinion, what is the purpose of public schools?

A. I always thought it was education.

* * *

[p. 1468] Q. Now, I'm talking about – my question is, is intentional segregation of public schools harmful?

A. My answer is, I [sic] doesn't have to be.

Q. Is it ever, though?

A. Anywhere at any point in time throughout history?

Q. Can you answer my question?

A. Not the way it's stated.

Q. Okay. Fine.

You indicated that you believe that the argument that – and correct me if I misunderstood this. I may have. That the argument of success depends on racial lines, or something to that effect there, is a racist argument.

Did you understand the position of the plaintiffs in this case to be that black people cannot be successful at anything if they are in an all-black environments [sic], that there's no way they can be successful?

A. I don't have a real understanding of what the plaintiffs are up to. I'm asked to come and testify about what I know, and that's what I did. That is, I haven't discussed with the plaintiffs what their positions are.

Q. You also indicated that black students have – don't have to be in classes to learn –

A. No, they don't have to be –

Q. – with white children –

A. That's right.

* * *

ARTHUR STELLER

[p. 1482] Q. Doctor Steller, do you have an opinion with respect to what impact the implementation of Doctor Foster's proposal would have on the degree of parental involvement that we have in the district at this point in time?

A. Yes, in a variety of ways.

Q. Would you state those opinions, please.

A. One would be in – there was no – seemingly no consideration taken in the Foster plans, A or B, to – and I think that was a question that you asked Doctor Foster yesterday – relative to bilingual students.

There are advisory committees for bilingual programs. It would be possible for many families, they would have youngsters in two different schools, and by having youngsters, not just many parents would have youngsters in two different schools, but in the bilingual situation it would be an additional hardship because they would have two sets of meetings to go for – to go to

attend for bilingual parent meetings, which is a very strong component of our bilingual program. Not only is that somewhat of a scheduling difficulty, it's an additional burden upon bilingual parents to have attend two separate meetings [p. 1483] for the purposes of the bilingual.

The same thing is true with chapter I students. We have a chapter I program where one part of the program is a parent program, and parents attend meetings, advisory meetings, and meetings on how to be a parent and how to reinforce what the school is doing. And a chapter I family could have a youngster in two different schools and, therefore, have to attend double the number of meetings. Obviously, many parents would not choose to do that.

The same thing is true for parents in special education, where they have – would have, perhaps, a youngster in more than one special education program in two different schools.

There's the requirements, due to federal regulations, of IEP's, for instance, that require going to the school, meeting with school staff.

It's the opinion of our special education department and staff that the involvement of parents in chapter I and bilingual programs and special education would drop off heavily because of all those requirements, simply the number of meetings, the transportation, the mileage back and forth between the two skills, some parents in those programs do not have transportation to get them there. So that would create an additional burden. The same

burden is felt by any parent, whether they have a youngster in any of those programs.

But they would have membership in – or hopeful they would [p. 1484] have membership, we try to encourage membership – in more than one PTA if they had more than one youngster. That would be double the dues, double the PTA meetings, double the fund raisers, double all the activities involved in PTA organizations. And by putting that additional burden on parents, as a practical matter, they simply would not choose to participate in double the number of activities.

So that I think there would be a – well, I'm sure that there would be a great drop off in PTA membership and involvement in those organizations, and general parental involvement, however you define it, in schools.

* * *

[p. 1496] A. * * * Basically, the bottom line is that under the Foster proposal there would be 632 fewer students eligible for chapter I under plan A, that's 21 percent fewer students eligible for remedial math and reading help under plan A, and 710 fewer students, or 24 percent fewer under Foster plan B, which is somewhat ironic. You know, when – what we would have then would be fewer students participating in bilingual programs, a hardship on special education programs, and fewer students that would be eligible to participate in chapter I programs.

* * *

[p. 1500] Q. Doctor Steller, do you have an opinion, based upon conferring with your Cabinet Members and Key Administrative staff, with respect to the total cost to

implement plan A in the first year? And by "total cost," I mean total transportation and all the other financial aspects that you have just been discussing.

A. Yes, I do.

Q. And what is that opinion?

A. The total cost – which would include virtually everything that I've discussed, and perhaps a couple of other minor points – but the first-year cost of plan A would be $7,402,913.50.

Q. What would be the cost of operation under plan A for each year after the first year?

A. All right. After the first year the cost goes down. It's $1,678,958.50.

* * *

[p. 1502] A. * * * One of the first things, if we were talking about implementing plan A or plan B, Foster's plan A or plan B, at this point in the year, or at any year after April 10th, and –

MR. DAY: Do you need some more water?

THE WITNESS: Excuse me. I need some more something.

A. – Any point after April 10th when we were considering school closings, here's what we would be looking at.

In terms of school closings, one high school, one middle school, one middle school alternative school, 20 elementary [p. 1503] schools, for a total of 2.5 million dollars.

Now, of course, closing schools would make us go back and redo everything else in the foster plans. But that is something that – I mean, if you have to pay for it, you have to pay for it some way. So that would be 2.5 million dollars from closing schools.

Renegotiate union contracts, a million dollars. That would not be a very easy task, but that's on the list.

Eliminate supplemental salaries for teachers in middle school and high school, which means coaches, band, vocal music, things like that. That would be $600,000.

Q. Excuse me, when you said "renegotiate the union contract," cost of a million dollars, were you saying that you would attempt to undertake negotiations with the teachers union to try to get them to take less money?

A. That's true. You said "Try to get them to take less money." That would be very much the case.

Q. Sorry to interrupt you. I'm sorry.

A. That would not be easy, obviously, to accomplish, but, given the constraints, that might be something that we would decide to do.

Reduce purchase of instructional supplies and equipment by the tune of $350,000.

Reduce Maintenance positions $350,000.

Further reduction of campus police positions, $200,000.

[p. 1504] Reduce clerical, instructional aides and secretarial positions, 1.5 million dollars.

Reduce more custodial positions and supplies, like custodial supplies, $600,000.

Drop more administrative positions, $200,000.

Reduce substitute teacher allocations, $500,000.

Reduce vehicle and garage expenses, a hundred thousand dollars. Now, that one we would probably drop off the list, because if we're going to add between 85 and 125 more buses, we would not be able to reduce that figure.

Reduce school district textbook expenditures $200,000.

Eliminate district's contribution to teacher retirement, which means we'd have to renegotiate that with teachers, and that would be 2.7 million dollars.

Reduce ten more central office, principal and assistant principal administrative positions and reassign those individuals to teaching positions. That would be $150,000.

Then we also said at the bottom that we would file for bankruptcy, apply for governmental loans, and adopt an early release program for students.

Now, this figure, the figures that I gave, add up to more than the cost of either plan A or plan B, but they're the kinds of things that would have to be done to pay for either plan A or Plan B.

Q. Do you believe it would have an effect on the effective [p. 1505] schools program presently being implemented in the district?

A. It would have an effect on virtually every part of the program. I think simply making those kind of cuts, in and of themselves, discounting the negative impact that Foster's plan would have on parents in the community, but simply implementing those kinds of cuts, people would leave the district, period. I mean, forget what kind of organizational grade-level plan we'd have, people would simply leave the district if we had to implement that kind of additional cuts.

Q. Doctor Steller, during the defendant's case, several witnesses referred to action taken by other governmental agencies. For example, the City Planning Commission, the City Housing Authority and the Interstate Highway Authorities.

My question to you, sir, is whether or not the Oklahoma City Board of Education consults or is consulted by any of these organizations before they take any action with respect to the location of public housing, zoning ordinances, or location of interstate highways.

A. In the two years that I have been here, I have never seen any correspondence or any – any reference from any of those Governmental agencies. We have no liaison function, except in the most informal sense, with any of those agencies.

* * *

[p. 1518] Q. Does the district receive Chapter II funds?

A. Yes.

Q. And you have discretion, a wide area of discretion in which to use those funds; isn't that correct?

A. Yes, and we're currently using those funds, for the last two years, in effective schools measures.

Q. But those funds are available for any program that was in existence prior to the Education Consolidation Act of 1981; isn't that true?

A. They are used – there are some restrictions, but they're funds that basically the school district can determine.

However, if we took those funds away from the effective schools program, obviously that would effect all students in all elementary schools, and that would seemingly be counterproductive to what the district's all about.

Q. Those funds would be available to provide compensatory services to children reassigned as a result of a desegregation plan?

A. They would be, however, as I stated, they would be have – you would have to take those funds away from what they're currently being expended for, and that is an effective schools program.

* * *

PLAINTIFF'S EXHIBIT 48

Racial Composition of Elementary School Faculties,*
1972-73, 1984-85, 1985-86, 1986-87

	1972-73 % Black	1984-85 % Black	1985-86 % Black	1986-87 % Black
Adams	21	16	18	14
Arcadia	17	32	18	20
Arthur	20	23	20	15
Bodine	20	26	23	23
Britton	17	38	22	24
Buchanan	17	24	17	10
Burbank	18	63		
Cleveland	19			
Columbus	16	16	21	27
Coolidge	19	17	17	18
Creston Hills	28	48	57	43
Culbertson	20			
Davis	18	36	22	17
Dewey	21	15	48	42
Dunbar	25	29	36	
Edgemere	19	35	26	39
Edison	37			
Edwards	15	48	65	70
Eugene Field	18	32	16	17
Fillmore	23	19	23	25
Garden Oaks	39	48	40	50
Garfield	22			
Gatewood	24	29	34	27

	1972-73 % Black	1984-85 % Black	1985-86 % Black	1986-87 % Black
Green Pastures	18	36		
Harrison	18	43	39	38
Hawthorne	23	40	37	41
Hayes	16	29	36	29
Henry	22			
Heronville	21	22	27	29
Hillcrest	16	23	17	18
Horace Mann	20	36	38	33
Johnson	15	13	15	15
Kaiser	23	32	35	31
King		30	26	43
Lafayette	25	29	22	22
Lee	25	14	14	18
Lincoln	21	55	49	64
Linwood	17	8	9	10
Lone Star	22			
Longfellow	20	16	31	38
Madison	19	25	13	17
Mark Twain	18	16	24	35
Mayfair	23			
McKinley	25			
Monroe	21	24	20	27
Nichols Hills	27			
North Highland	19	34	39	38
Oakridge	20	40	33	26
Page	31			
Page-Woodson		32		
Parker	22	29	44	46
Parmelee	21	23	22	21
Pierce	17	19	17	10
Polk	19	32	43	46

	1972-73 % Black	1984-85 % Black	1985-86 % Black	1986-87 % Black
Prairie Queen	26	15	11	17
Putnam Heights	14	20	31	31
Quail Creek	20	24	30	30
Rancho Village	23	18	0	0
Ridgeview	20	22	24	29
Riverside	24	49		
Rockwood	18	21	26	36
Ross	19			
Sequoyah	21	29	27	24
Shidler	20	32	39	35
Shields Heights	18	27	26	30
Southern Hills	22	27	27	22
Spencer	18	43	36	30
Stand Watie	17	17	16	19
Star	29	31	27	31
Stonegate	21	20	20	24
Sunset	27			
Telstar	17	45	56	65
Truman	32	42	33	44
Tyler	31			
Valley Brook	18			
Van Buren	22	24	11	22
West Nichols Hills	21	22	38	17
Western Village	13	19	14	23
Westwood	15	40	38	38
Wheeler	17	22	35	27
Willard	27	35	25	21

	1972-73 % Black	1984-85 % Black	1985-86 % Black	1986-87 % Black
Willow Brook	24	34	44	42
Wilson	21	23	17	21
Woodson	44			
[NO. SCHOOLS]	82	69	65	64
[AVERAGE % BLACK]	21%	29%	27%	28%
[RANGE]	13%-44%	8%-63%	0%-65%	0%-70%

*Source: PX 29 (Exhibit 2(a) to Defendants' Answers to Plaintiffs' First Interrogatories on Remand).

Fifth-grade centers omitted for 1985-86 and 1986-87 school years because of non-comparable grade structure of Hoover.

PLAINTIFF'S EXHIBIT 50

1984-85 Elementary Enrollment and Faculty – Percent Black*

School	Faculty 1984-85 % Black	Enrl. 1984-85 % Black
Burbank	63	35.4
Lincoln	55	36.9
Riverside	49	13.6
Edwards	48	29.7
Creston Hills	48	41.4
Garden Oaks	48	36.9
Telstar	45	68.3
Harrison	43	45.8
Spencer	43	65.5
Truman	42	27.6
Oakridge	40	49.7
Hawthorne	40	28.4
Westwood	40	21.0
Britton	38	40.6
Davis	36	45.9
Horace Mann	36	28.8
Willard	35	21.2
Edgemere	35	51.8
Willow Brook	34	62.7
North Highland	34	46.5
Arcadia	32	34.6

School	Faculty 1984-85 % Black	Enrl. 1984-85 % Black
Eugene Field	32	34.9
Polk	32	31.6
Kaiser	32	37.8
Shidler	32	30.7
Star	31	54.0
King	30	43.2
Gatewood	29	44.9
Lafayette	29	40.3
Sequoyah	29	36.3
Parker	29	72.3
Hayes	29	25.7
Shields Heights	27	25.5
Southern Hills	27	35.4
Bodine	26	36.0
Madison	25	23.6
Quail Creek	24	31.0
Monroe	24	33.5
Van Buren	24	23.3
Buchanan	24	27.0
Arthur	23	20.2
Hillcrest	23	37.5
Parmelee	23	38.6
Wilson	23	29.0
Heronville	22	25.7
Ridgeview	22	30.6
West Nichols Hills	22	35.1
Wheeler	22	23.2
Rockwood	21	35.4
Putnam Heights	20	45.8

School	Faculty 1984-85 % Black	Enrl. 1984-85 % Black
Stonegate	20	42.2
Fillmore	19	29.6
Western Village	19	52.0
Pierce	19	28.2
Rancho Village	18	20.7
Stand Watie	17	22.5
Coolidge	17	27.6
Longfellow	16	32.2
Mark Twain	16	33.5
Adams	16	26.7
Columbus	16	16.9
Prairie Queen	15	25.9
Dewey	15	33.5
Lee	14	21.5
Johnson	13	57.4
Linwood	8	17.5

*Source: PX 25 (Exhibit 1(b) to Defendants' Answers to Plaintiffs' First Interrogatories on Remand), PX 29 (Exhibit 2(a) to Defendants' Answers to Plaintiffs' First Interrogatories on Remand)

PLAINTIFF'S EXHIBIT 52

1985-86 Elementary Enrollment and Faculty – Percent Black*

School	Faculty 1985-86 % Black	Enrl. 1985-86 % Black
Edwards	65	99.3
Creston Hills	57	98.8
Telstar	56	58.2
Lincoln	49	97.5
Dewey	48	97.1
Parker	44	97.3
Willow Brook	44	46.4
Polk	43	97.7
Garden Oaks	40	98.8
North Highland	39	96.3
Shidler	39	37.1
Harrison	39	43.9
Westwood	38	24.2
West Nichols Hills	38	21.3
Horace Mann	38	33.1
Hawthorne	37	15.6
Hayes	36	10.9
Spencer	36	71.1
Kaiser	35	12.8
Wheeler	35	9.7

School	Faculty 1985-86 % Black	Enrl. 1985-86 % Black
Gatewood	34	32.3
Oakridge	33	45.6
Truman	33	99.3
Putnam Heights	31	30.3
Longfellow	31	99.3
Quail Creek	30	15.8
Southern Hills	27	7.6
Star	17	54.6
Heronville	27	12.2
Sequoyah	27	16.9
Rockwood	26	35.0
Shields Heights	26	3.7
King	26	99.5
Edgemere	26	53.5
Willard	25	4.9
Mark Twain	24	9.8
Ridgeview	24	18.6
Bodine	23	34.5
Fillmore	23	9.3
Britton	22	37.3
Davis	22	8.4
Parmelee	22	6.3
Lafayette	22	1.8
Columbus	21	15.5
Stonegate	20	33.2
Monroe	20	21.4
Arthur	20	6.3
Adams	18	8.3
Arcadia	18	30.3
Coolidge	17	7.5

School	Faculty 1985-86 % Black	Enrl. 1985-86 % Black
Pierce	17	17.8
Wilson	17	31.6
Buchanan	17	8.2
Hillcrest	17	5.1
Eugene Field	16	32.2
Stand Watie	16	28.8
Johnson	15	31.4
Western Village	14	65.0
Lee	14	7.9
Madison	13	10.7
Prairie Queen	11	6.1
Van Buren	11	8.8
Linwood	9	9.3
Rancho Village	0	6.1

*Source: PX 25 (Exhibit 1(b) to Defendants' Answers to Plaintiffs' First Interrogatories on Remand), PX 29 (Exhibit 2(a) to Defendants' Answers to Plaintiffs' First Interrogatories on Remand)

PLAINTIFF'S EXHIBIT 54

1986-87 Elementary Enrollment and Faculty – Percent Black*

School	Faculty 1986-87 % Black	Enrl. 1986-87 % Black
Edwards	70	99.5
Telstar	65	59.7
Lincoln	64	99.3
Garden Oaks	50	98.3
Polk	46	98.8
Parker	46	96.9
Truman	44	99.7
King	43	98.9
Creston Hills	43	99.0
Dewey	42	98.4
Willow Brook	42	51.5
Hawthorne	41	19.2
Edgemere	39	51.3
Longfellow	38	99.1
Westwood	38	20.0
Harrison	38	49.4
North Highland	38	97.5
Rockwood	36	41.5
Shidler	35	37.1
Mark Twain	35	9.7
Horace Mann	33	35.2
Putnam Heights	31	34.8
Kaiser	31	18.1

School	Faculty 1986-87 % Black	Enrl. 1986-87 % Black
Star	31	61.4
Shields Heights	30	3.9
Quail Creek	30	13.1
Spencer	30	76.3
Heronville	29	8.9
Ridgeview	29	17.1
Hayes	29	11.2
Monroe	27	15.9
Gatewood	27	25.7
Columbus	27	15.2
Wheeler	27	8.1
Oakridge	26	42.3
Fillmore	25	6.4
Stonegate	24	33.1
Sequoyah	24	19.5
Britton	24	37.9
Bodine	23	34.2
Western Village	23	65.6
Southern Hills	22	7.0
Lafayette	22	2.7
Van Buren	22	7.7
Willard	21	9.1
Parmelee	21	11.8
Wilson	21	26.4
Arcadia	20	28.5
Stand Watie	19	25.9
Lee	18	6.6
Hillcrest	18	11.6
Coolidge	18	5.1

School	Faculty 1986-87 % Black	Enrl. 1986-87 % Black
West Nichols Hills	17	20.0
Eugene Field	17	31.8
Prairie Queen	17	6.2
Madison	17	15.0
Davis	17	9.9
Johnson	15	27.4
Arthur	15	7.3
Adams	14	6.1
Buchanan	10	8.8
Pierce	10	16.3
Linwood	10	13.6
Rancho Village	0	10.6

*Source: PX 25 (Exhibit 1(b) to Defendants' Answers to Plaintiffs' First Interrogatories on Remand), PX 29 (Exhibit 2(a) to Defendants' Answers to Plaintiffs' First Interrogatories on Remand)

PLAINTIFF'S EXHIBIT 56

Minutes, December 10, 1984,
School Board Meeting

The Board of Education of Independent School District Number 89 of Oklahoma County, Oklahoma, met in a special, meeting in the Board Room, Administration Building, 900 North Klein, Monday, December 10, 1984 at 6:30 P.M.

Present: Susan Homes President
LaRue Donworth Vice President
Jean Brody Member
Paul Heath Member
Betty Hill Member
Hugh Long Member
Clyde Muse Member

* * *

SPECIAL BUSINESS

The purpose of the special meeting was for public hearings on the 1985-86 Student Assignment Plan. Mrs. Homes announced the method for conducting the hearings and called on the speakers.

Seventy-five persons were heard, and their remarks are summarized as follows:

1. Chuck Keeler, Teacher, Classen High School, spoke in favor of the HALO (A.F.T. proposed) Plan.
2. Bob Stalnaker, Teacher, Eisenhower Middle School, felt Eisenhower would be underutilized as a fifth year center as proposed in the plan. He also asked about the Board's intentions for the Arcadia area.
3. Diane Harvey-Oden, Monroe School Patron, suggested that integration should begin before fifth

grade; felt if the plan was implemented, desegregation would not be as good as it is now.

4. Wayne Dempsey, Patron, expressed concern with the plan, specifically to the elementary school issue. Closing Classen High School was also discussed. Mr. Dempsey disapproved the previous allowance of transfers, and felt Classen should be left open.
5. Joyce Henderson, Principal of Classen High School, asked that Classen be continued, but as a special (magnet) high school.
6. Alfred N. Blakeley, Patron, commended the Board for taking a stand spoke against the concept of 'separate but equal'; proposed the Board consider this a preliminary plan and not take action at this time.
7. Carolyn Wallace, Northwest Classen Patron, commended the board on the plan; felt those responsible for the plan would be alert to any inequities and the measures to correct them should they occur.
8. Charles Moore, Patron, Classen area, suggested the Board was moving much too fast and needed to study the plan further.
9. Julie Perkins, Student, Capitol Hill Middle School, asked that the students not be asked to move; that the school not be changed to a fifth year center.
10. Sheldon Dadson, student, Capitol Hill Middle School, spoke on retaining the school as a middle school and told of the special programs there.
11. Effie Grimes, Patron, Northeast area, spoke against the plan; felt the current assignments were working; felt the proposed plan would create segregation again.
12. Joyce Collins, Patron, Capitol Hill Middle School, asked that the school be left a middle school.
13. Ed Kirkpatrick, Classen High School parent stated that philosophically he had a problem with the plan because of the possible re-segregation.

14. Katrina Adams, Student, Capitol Hill Middle School, stated majority of students did not want the school changed to a fifth year center. She presented the Board with a petition signed by the students.

15. Michael Stephenson, Student, Capitol Hill Middle School, spoke against making the school a fifth year center.

16. Mike Wetmore, Student, Classen High School, asked about transportation for the students if they were transferred to Northwest; felt the Board had not given the HALO Plan serious consideration; and felt Classen should not be overlooked because they did not "make waves".

17. Kay Floyd, Eisenhower Middle School Patron, stated a concern that if the plan was approved, Hoover would need portables, have large classes, and require teachers to travel from room to room. Requested opening Nichols Hills as a fifth year center and leaving Eisenhower and Hoover as middle schools.

18. Chester Boevers, Patron, support the proposed plan; like the neighborhood school concept.

19. Charlene H. Moore, Student, Classen High School, suggested the Board consider moving the Cleveland students to Classen, using Classen as a magnet, or changing the boundaries. If Classen is to be closed, asked that the students and teachers be moved to N.W. Classen with allowance for special transfer to Douglas or N.E. on request.

20. Dianne Kruegar, Patron, Arcadia, felt the fifth grade was too late for integration; asked if the fifth grade could be left at the Arcadia Elementary School.

21. Charles Alexander, Teacher, Capitol Hill Middle School, spoke against the plan. He felt the plan was a step backward, caused unnecessary movement of

staff, loss of pay for some, and retained the "unnecessary" fifth year centers. He proposed the HALO Plan.

22. Kylle Kerstan, Teacher, Rogers Middle School, continued to explain the A.F.T.'s plan. She felt the Union and community input should have been sought – suggested a modification of the Board Committee's plan.

23. Ann Turner, Teacher, Grant High School, continued discusion [sic] of the HALO Plan, which was developed after input from teachers and patrons was sought.

24. Ruth Nichols, Teacher, also outlined a part of the HALO Plan.

25. Tony DeGlusti, AFT Staff, continued the presentation about the AFT proposed HALO plan; stated affirmative action was a "given" in the plan; stated the plan offered was not perfect, but is an alternative.

26. Georgia Iannello, President, A.F.T., asked that the Board take a serious look at the plan, look at the cost. She said the teachers were concerned about resegregation, and asked the Board to take some more time.

27. Mary Hamilton, Lafayette Kindergarten Teacher, said that Lafayette should be the starting point as a neighborhood school.

28. Cherie Scott, Bodine Patron, asked that the fifth grade be left at Bodine; wanted justification for the fifth graders to be moved.

29. Sam Barnett, Capitol Hill Middle School Parent, supported leaving CHMS a middle school; asked that the Board reconsider making the school a fifth year center.

30. Leslie Brown, Acting President, Oklahoma City Branch of NAACP, stated that his organization

opposed the plan as presented; that the district should not return to a segregated society, and felt the plan did this.

31. Pamela Woody, Oakridge Patron, asked for consideration of Oakridge as a K-5 school.

At 8:00 p.m. President Hermes declared a recess. The Board reconvened at 8:14 p.m. Mr. Long left the meeting during the recess.

32. Barbara Erickson, Teacher, Classen High School, stated she believed in the integrated school system; could not support resegregation; felt Classen was a fine school.

33. Jan Collins, Patron, supported the revised student assignment plan as a step forward to neighborhood schools. She asked that the board consider eliminating fifth year centers; and asked that K-5 schools be instituted. Ms. Collins presented a petition supporting those views to the Board.

34. Rita Chapple Clytus, Patron, spoke against cross-town busing for purposes of desegregation; supported the plan; asked for racial integration using field trips, etc., rather than busing.

35. Freddie Williams, Patron, commended the Board for their actions; supported the plans; opposed busing; asked the Board to fortify the plan with equity, care, and concern.

36. Mildred E. Rayner, Patron, Teacher, expressed concern for the students and staff of CHMS as well as the fifth grade students to be assigned there under the new plan because of the size of the playground, facilities, location, number of restrooms, etc.; asked about the cost of adapting the school for fifth year use; asked the CHMS be left as is.

37. Linda Sellers, Patron, CHMS Teacher, stated CHMS has a good program, and is self-supporting as far as

special activities are concerned; gave examples of their efforts. She supported leaving the school a middle school.

38. Brenda Fink, Patron, supported the new proposed plan over the Finger Plan.

39. Heather Howerton, Student CHMS, wished to "save the school".

40. Eunice O. Farbes, Teacher, Classen High School, stated that students of all races need to go to school together as little children if integration is to be successful. Asked that the Board find a way to keep Classen open as a kind of school that would "pull in" students.

41. Mrs. Andrew J. Brooks, Teacher, Classen High School, spoke against the plan; felt it was a step backward and would not support integration.

42. Mary Edwards, Patron, spoke for the proposed plan.

43. Jamie Atherton, Patron, supported the proposal; supported the concept of neighborhood schools.

44. Sheila Thornton, Patron, supported the plan.

45. Jay Mercer, Patron, supported the plan, either K-4 or K-5; felt that main concern should be safety of the kids.

46. Leora Cole, Patron, was against the busing of children, kindergarten through fourth grade; stated that busing prevented participation by students in extra curricular activities; supported the plan.

47. Ann Wilson Witte, Teacher, President of OEA, OKC, expressed concern about transfer of teachers; asked the teachers be treated fairly and with dignity.

48. Beth Antonelli, Patron, wanted equal opportunity in education, regardless of where the students attended school; supported the proposed plan.

49. Mary Ann Gates, patron, supported the proposal.

50. Billie Oldham, Patron, was for the plan.

51. Kathy Shinn, Patron, supported the plan.

52. Clara Luper, Patron, Teacher, John Marshall High School, spoke against the plan, and said litigation would follow if the plan was adopted.

53. Gwen Sneed spoke against the plan; asked the Board to review the proposal and come up with something different.

54. Debbie Robinson supported the proposal so that her children would not be bused across town.

55. Cecil Williams spoke to the issue, opposing the plan.

56. Chelle Luper, Student, NAACP Youth Council, was against the plan.

57. Charles Wilson spoke against the plan; liked things the way they are now.

58. Sheronda Mitchell, NAACP Youth Council, spoke for integrated schools and against the plan.

59. Darlene Smith, Dewey Fifth Year Center Patron, spoke in support of the plan.

60. Clyde Madden, Patron, spoke in opposition to the plan; asked the Board to vote the plan down.

61. Wayne Vincent, Patron, Classen High School, said he was concerned that the discussion seemed to be that of a black/white issue. He proposed that the plan for Classen be termed "reorganization"; that Northwest Classen should be renamed Classen.

62. Ira Hall, Patron, said whatever plan was decided on, we should all work for the welfare of the children.

63. Phoebe Revelle, Teacher, Northeast High School, voiced her pride in the OKC Public Schools; spoke against the plan, stating that it offered a return to segregation.

64. James O. Morrissey supported the plan; thanked the Board for "taking up the torch" for the students.

65. Marilyn A. Hildreth, Patron, West Nichols Hills, spoke against the plan; said that she would rather have her child ride a bus than go to segregated schools.

66. Earnestine M. Bell spoke against the plan.

67. Zack Phillips, Patron, spoke against the plan; said the plan would not work. He asked that the Board come out with a "decent" plan for all students.

68. Lael Erickson, Patron, spoke against the plan; stated that it [is] regressive rather than progressive.

69. Barbara True supported the plan. She said it was not going backward; rather, it will give the children in grades K-4 a feeling of security being nearer to home.

70. Kay Ahaus, Patron, asked the Board to reconsider the plan, to not act in haste. Regarding Hoover and Eisenhower, she felt they would be overcrowded under the proposed plan.

71. Robert Schumacher, Student, Southeast High School, thanked the Board for listening.

72. Leonard Senton, President, OKC Urban League, said that when the original plan was developed it was unfair in the black children had to be bused grades 1-4 and white did not. He said if we are not going to have two-way busing, then students should be allowed to stay in their own neighborhoods.

73. Joanel Provo, Teacher, CHMS, spoke against the plan.

74. Wallace Johnson supported delaying any action until further study takes place.

75. Blanton Bennett opposed the plans; asked for a postponement until a plan beneficial to all concerned could be developed.

* * *

DEFENDANT'S EXHIBIT 5D

Oklahoma City Population Change in East Inner-City Tracts, 1950-1980

	BLACK POPULATION			
TRACT NO.*	1950	1960	1970**	1980**
13	660	4818	5463	4198
27	686	2696	1691	22
28	2233	6784	4554	3504
29	5244	3684	1183	447
30	3976	5066	2746	853
38	4828	3324	1625	912
79	not tracted	2905	2747	2623

	TOTAL POPULATION			
TRACT NO.*	1950	1960	1970**	1980**
13	4618	5531	5655	4278
27	3496	3684	1821	45
28	6699	7097	4631	3617
29	5368	3747	1190	456
30	7673	6488	3026	1082
38	6446	4115	1768	1064
79	not tracted	3030	2791	2663

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*Proportion of total Oklahoma City black population living in these tracts: 1950, 82%; 1960, 84%; 1980, 16.8%.

**The tract numbers for 1970 and 1980 had the number 10 preceding each original tract number, i.e., tract 13 became tract 1013.

Source: U.S. Census

DEFENDANT'S EXHIBIT 5E

Oklahoma City Black Population Turnover* in East Inner-City Tracts

TRACT NO.**	1965-70 (percent)	1975-80 (percent)
13	40.5	23.8
27	49.9	no data
28	31.0	35.5
29	38.9	39.5
30	60.7	49.4
38	59.4	48.5
79	31.2	no data
Average % Turnover	42.0	33.2

*Percent who did not live in the same house 5 years previously.

**The tract numbers for 1975-80 had the number 10 preceding each original tract number, i.e., tract 13 became tract 1013.

Source: U.S. Census

DEFENDANT'S EXHIBIT 6

Population Growth/Change in Oklahoma City

POPULATION GROWTH/CHANGE IN THE OKLAHOMA CITY METROPOLITAN AREA

		% Growth 1960-1970	Absolute White Change	Absolute Black Change
Oklahoma School District	(1)	1.6%	-6784	8126
	(2)	25.7%	1986	1247
	(3)	-8.8%	-64	-85
Eastern Oklahoma County		38.3%	20571	3666
Northern Oklahoma County		77.2%	7763	65
Western Oklahoma County		112.9%	54352	75
Part of Canadian County		***	***	***

		% Growth 1970-1980	Absolute White Change	Absolute Black Change
Oklahoma School District	(1)	-7.8%	-36185	5093
	(2)	10.5%	-1254	2650
	(3)	40.3%	535	-55
Eastern Oklahoma County		28.2%	17633	8854
Northern Oklahoma County		94.4%	15423	781
Western Oklahoma County		17.0%	11257	2907
Part of Canadian County		165.8%	23692	118

		% Growth 1960-1980	Absolute White Change	Absolute Black Change
Oklahoma School District	(1)	-6.3%	-42969	13219
	(2)	38.7%	732	3897
	(3)	28.0%	471	-140
Eastern Oklahoma County		77.4%	38204	12550
Northern Oklahoma County		244.5%	23186	846
Western Oklahoma County		149.2%	65609	2982
Part of Canadian County		***	***	***

*** Canadian County was untracted in 1960
See Map for Geographic Units

Source: U.S. Census of Population, 1960, 1970, and 1980.

DEFENDANT'S EXHIBIT 10
Abstract, Clark, Residential Segregation
in American Cities

Population Research and Policy Review 5: 95-127 (1986)
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Residential segregation in American cities: a review and interpretation

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Abstract. Significant levels of separation between blacks and whites still exist in large American cities, and debate about the causes of that residential separation has been considerable. A balanced analysis of the factors that might explain residential segregation – economic status (affordability), social preferences, urban structure, and discrimination – suggests that no one factor can account for the patterns that have arisen in U.S. metropolitan areas. Empirical estimation of the impact of economic status suggests that 30-70 percent of racial separation is attributable to economic factors. However, economic factors do not act alone, but in association with preferences. Together with elements of the urban structure, these factors bear much of the explanatory weight for present residential patterns. Survey evidence from both national and local studies shows that black households prefer neighborhoods that are half black and half white, while whites prefer neighborhoods ranging from 0 to 30 percent black.

The debate about causes seems most polarized over the role of discrimination. Although comments in the literature often focus on the past use of racially restrictive covenants by state-regulated agencies and discriminatory acts by realtors and financial institutions, the documented individual cases of discrimination do not appear to be part of a massive collusion to deny housing opportunities to minorities. A review of the evidence from social science investigations demonstrates that there are multiple causes of racial residential separation in U.S. metropolitan areas.

* * *

An earlier version of this paper was presented to the U.S. Commission on Civil Rights, Washington, D.C., November 12, 1985.

* * *

DEFENDANT'S EXHIBIT 11

Oklahoma City Public Schools
Percent Black in Residential Zones

Residential Zone (School Name)	Percent Black 1972	Percent Black 1986	Projected Percent Black 1995
Eugene Field	0.6	31.9	39.5
Sequoyah	0.0	26.2	34.9
Britton	0.4	25.9	37.0
Stonegate	0.5	21.9	32.5
Ridgeview	0.1	17.5	29.8
Hawthorne	0.9	17.3	28.1
Johnson	0.0	13.9	26.7
Davis	0.3	13.8	25.1
Kaiser	0.0	13.2	24.5
Parmelee	0.0	12.2	23.3
Linwood	0.4	11.6	23.6
W. Nichols Hills	0.3	10.4	23.2
Madison	0.3	10.0	22.5
Hillcrest	0.3	9.8	21.5
Cleveland	0.5	8.8	22.1
Mayfair	0.2	8.4	21.0
Hayes	0.7	7.9	20.3
Arthur	0.2	7.9	20.6
Burbank	0.0	7.5	20.8
Adams	0.0	7.4	20.4
Monroe	0.2	7.0	20.6
Quail Creek	0.0	6.3	19.5
Lee	0.2	6.1	19.3
Heronville	0.7	6.1	18.8
Fillmore	0.5	5.4	18.3
Southern Hills	0.1	5.1	18.1
Mckinley	0.0	5.1	18.1
Pierce	0.2	5.0	18.9
Buchanan	0.3	4.8	18.4
Coolidge	0.0	4.3	17.5

Residential Zone (School Name)	Percent Black 1972	Percent Black 1986	Projected Percent Black 1995
Shields Heights	0.0	3.9	17.6
Henry	0.8	3.6	17.0
Prairie Queen	0.1	3.1	16.7
Rancho	0.0	3.1	16.6
Sunset	0.5	2.8	17.3
Stand Watie	0.2	2.5	16.6
Garfield	0.0	2.4	16.6
Lafayette	0.0	2.4	16.2
Valley Brook	0.9	2.1	16.8
Telstar	4.8	64.9	66.0
Western Village	2.2	64.8	64.0
Harrison	2.5	56.3	60.2
Star	4.2	46.8	53.5
Bodine	3.2	40.7	46.3
Oakridge	1.9	39.3	45.8
Wilson	2.5	33.7	42.7
Lone Star	3.0	31.7	39.7
Gatewood	5.0	28.4	37.3
Putnam Heights	3.1	26.4	35.9
Wheeler	1.3	15.9	26.7
Columbus	2.1	7.4	20.4
Van Buren	1.3	7.3	20.1
Belle Isle	1.6	7.3	20.4
Ross	1.2	3.0	17.3
Westwood	1.8	2.0	17.1
Willow Brook	5.1	61.9	63.9
Willard	5.3	9.3	22.6
Tyler	5.5	29.6	36.8
Edgemere	8.9	48.9	54.1
Emerson	10.2	37.9	44.5
Mark Twain	12.3	16.5	27.4
Spencer	17.9	71.5	71.2
Riverside	20.2	14.6	26.1

Residential Zone (School Name)	Percent Black 1972	Percent Black 1986	Projected Percent Black 1995
Nichols Hills	23.5	51.2	54.5
Horace Mann	25.6	42.0	48.8
Rockwood	36.9	48.9	50.5
Shidler	53.1	43.1	47.9
North Highland	55.0	95.0	87.5
Arcadia	62.7	35.1	42.5
Near Spencer (2)	84.8	100.0	94.8
Near Spencer (1)	86.4	92.3	89.6
Green Pastures	95.4	95.2	91.6
Dewey	95.6	96.8	91.0
Polk	96.5	95.4	91.0
Lincoln	96.7	90.9	87.1
Dunbar	97.3	100.0	94.6
Edison	97.7	98.2	93.8
Edwards	97.8	99.4	94.8
Longfellow	97.8	97.5	92.9
Page	98.0	100.0	93.2
Near Parker	98.4	96.9	92.8
Parker	98.5	97.1	93.0
Harmony	98.6	98.9	93.5
Truman	98.9	99.3	94.4
Woodson	98.9	96.2	91.8
Garden Oaks	99.1	98.2	94.0
Creston Hills	99.3	98.8	94.3
Culbertson	99.3	98.1	93.5

DEFENDANT'S EXHIBIT 21

White Population in Oklahoma City SMSA
1970-1980

	1970	1980	Percent Change
All Ages:			
SMSA	571,229	644,868	12.89
Inside District Boundary	254,758	217,989	-14.43
Outside District Boundary	316,470	426,878	34.89
Ages 6-9:			
SMSA	44,076	37,759	-14.33
Inside District Boundary	17,558	10,383	-40.86
Outside District Boundary	26,517	27,375	3.24
Age 10:			
SMSA	11,578	9,913	-14.38
Inside District Boundary	4,637	2,451	-47.14
Outside District Boundary	6,940	7,461	7.51
Ages 11-13:			
SMSA	33,279	26,487	-20.41
Inside District Boundary	13,222	6,614	-49.98
Outside District Boundary	20,056	19,872	-0.91
Ages 14-17:			
SMSA	42,678	40,175	-5.86
Inside District Boundary	17,863	10,427	-41.63
Outside District Boundary	24,814	29,747	19.88

Source: 1970 and 1980 U.S. Census.

DEFENDANT'S EXHIBIT 24

Black Population in Oklahoma City SMSA 1970-1980

	1970	1980	Percent Change
All Ages:			
SMSA	54,267	73,374	35.21
Inside District Boundary	46,010	53,637	16.58
Outside District Boundary	8,256	19,736	139.03
Ages 6-9:			
SMSA	5,908	6,036	2.17
Inside District Boundary	5,034	4,450	-11.61
Outside District Boundary	873	1,585	81.54
Age 10:			
SMSA	1,600	1,501	-6.19
Inside District Boundary	1,353	1,133	-16.26
Outside District Boundary	246	367	49.06
Ages 11-13:			
SMSA	4,254	4,089	-3.88
Inside District Boundary	3,601	3,078	-14.53
Outside District Boundary	652	1,010	54.92
Ages 14-17:			
SMSA	4,829	6,270	29.84
Inside District Boundary	4,086	4,811	17.74
Outside District Boundary	742	1,458	96.47

Source: 1970 and 1980 U.S. Census.

DEFENDANT'S EXHIBIT 38

School Districts in Comparably Sized SMSA's

School Districts in Comparably Sized SMSAs*
Black versus Non-Black

District Location	Number of Schools	Total Number of Students	Percent Black	Dissimilarity Index	Year
Columbus, OH	126	67,202	44.0	0.136	1984
Providence, RI	29	18,280	26.0	0.185	1984
Louisville, KY[1]	144	91,912	30.0	0.193	1984
Dayton, OH	43	29,649	60.0	0.194	1984
Indianapolis, IN	86	53,087	46.0	0.194	1984
Syracuse, NY	34	20,720	33.0	0.196	1982
Buffalo, NY	75	46,818	47.0	0.224	1982
Greensboro, NC	37	21,908	49.0	0.245	1984
Worcester, MA	48	19,805	6.0	0.263	1984
Gastonia, NC[2]	55	31,843	17.0	0.284	1984
Norfolk, VA[3]	50	35,694	58.2	0.288	1986
Milwaukee, WI	137	87,308	51.0	0.303	1984
Nashville, TN[4]	119	63,030	36.0	0.308	1984
Rochester, NY	49	32,100	52.0	0.314	1984
Sacramento, CA	71	42,284	23.0	0.319	1984
Albany, NY	17	8,050	43.0	0.332	1984
Salt Lake City, UT	53	24,454	2.0	0.344	1984

District Location	Number of Schools	Total Number of Students	Percent Black	Dissimilarity Index	Year
Oklahoma City, OK	**86**	**39,837**	**39.3**	**0.389**	**1986**
Richmond, VA	55	29,626	86.0	0.406	1984
Jacksonville, FL[5]	144	99,582	36.0	0.422	1984
Orlando, FL[6]	97	80,044	24.0	0.423	1984
New Haven, CT	39	17,071	60.0	0.440	1984
Scranton, PA	25	11,976	2.0	0.471	1978
Palm Beach, FL[7]	95	76,185	28.0	0.519	1984
Portland, OR	111	50,628	15.0	0.533	1984
Kansas City, MO	73	36,228	68.0	0.540	1984
Tulsa, OK	91	44,833	26.0	0.557	1984
Hartford, CT	39	23,581	45.0	0.589	1984
San Antonio, TX	94	59,106	13.0	0.676	1984
Memphis, TN	105	73,291	78.0	0.677	1984
New Orleans, LA[8]	128	82,968	86.0	0.705	1984
Birmingham, AL	95	44,207	81.0	0.743	1984

* Based on 1984 SMSA populations reported in *1986 State and Metropolitan Data Book*. Includes 24th through 55th largest SMSAs (excluding Honolulu); Oklahoma City is ranked 39th.

Note: The dissimilarity index equals the number of students who must be reassigned to achieve racial balance relative to the number who would be reassigned if the district were completely segregated. An index of 1.0 corresponds to complete segregation. An index of 0.0 means every school has the districtwide proportion of blacks.

Source: Office of Civil Rights of the U.S. Department of Education; Norfolk Public School District membership records; Oklahoma City Public Schools membership records.

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[1] Jefferson County.

[2] Gaston County.

[3] Norfolk County.

[4] Davidson County.

[5] Duval County.

[6] Orange County.

[7] West Palm Beach County.

[8] New Orleans Parish.

DEFENDANT'S EXHIBIT 40

Indices for Residential Zones

Segregation Indices for Residential Zones
Actual Values: 1972-1986
Forecasts: 1987-1995
Oklahoma City Public Schools
Black versus Non-Black

Year	Enrollment	Percent Black	Dissimilarity Index	Exposure Index
1972	53,486	25.1	0.869	0.149
1973	48,874	27.5	0.856	0.160
1974	43,843	28.3	0.839	0.172
1975	45,324	30.0	0.809	0.188
1976	41,725	30.9	0.785	0.201
1977	41,428	32.3	0.763	0.212
1978	38,958	34.1	0.739	0.222
1979	38,420	35.1	0.727	0.229
1980	37,882	34.3	0.709	0.250
1981	36,386	36.1	0.709	0.248
1982	36,470	36.4	0.693	0.257
1983	35,994	37.4	0.672	0.266
1984	35,481	38.8	0.661	0.274
1985	35,514	39.1	0.651	0.283
1986	35,466	40.0	0.640	0.290
1987	35,189	40.6	0.619	0.304
1988	34,936	41.3	0.599	0.316
1989	34,708	41.9	0.580	0.328
1990	34,508	42.6	0.562	0.338
1991	34,315	43.1	0.544	0.348
1992	34,135	43.7	0.527	0.357
1993	33,974	44.2	0.510	0.365
1994	33,813	44.7	0.494	0.373
1995	33,667	45.2	0.478	0.381

* * *

Notes: The dissimilarity index for residential zones equals the number of students who would have to move to achieve racial balance relative to the number who would have to move if residential zones were completely segregated. An index of 1.0 corresponds to complete residential segregation. An index of 0.0 means every residential zone has the districtwide proportion of blacks.

The exposure index equals the average fraction of non-black students in black students' residential zones. An index of 0.0 corresponds to complete residential segregation.

Residential zones are defined by the 1972 Desegregation Plan.

Sources: Oklahoma City Public Schools assignment records. Enrollment totals exclude kindergarten, special education students and transfers into the district.

DEFENDANT'S EXHIBIT 45

Indices for All Schools

Segregation Indices for Oklahoma City Public Schools
Black versus Non-Black
All Schools

Year	Enrollment	Percent Black	Dis-similarity Index	Exposure Index
1970	71,089	22.9	0.817	0.182
1971	68,840	23.4	0.780	0.222
1972	60,674	26.4	0.277	0.669
1973	54,196	26.7	0.255	0.677
1974	52,143	28.3	0.236	0.670
1975	50,162	29.7	0.246	0.651
1976	47,941	31.1	0.254	0.636
1977	46,274	32.3	0.270	0.619
1978	42,933	33.1	0.245	0.619
1979	42,471	34.8	0.267	0.594
1980	40,961	35.3	0.230	0.603
1981	40,777	35.5	0.233	0.596
1982	41,427	35.5	0.244	0.592
1983	40,513	36.7	0.234	0.584
1984	40,373	38.3	0.244	0.563
1985	40,174	38.6	0.377	0.464
1986	39,837	39.3	0.389	0.453

* * *

Notes: The dissimilarity index equals the number of students who must be reassigned to achieve racial balance relative to the number who would be reassigned if the district were completely segregated. An index of 1.0 corresponds to complete segregation. An index of 0.0 means every school has the district wide proportion of blacks.

The exposure index equals the average fraction of non-black students in schools attended by blacks. An index of 0.0 corresponds to complete segregation.

Source: Oklahoma City Public Schools membership records.

DEFENDANT'S EXHIBIT 63

Racial Composition of Elementary Schools (K-4), 1985-86

Elementary Schools by Race
(Ranked by Percent of Black Students),
Oklahoma City Public Schools, 1985-86

Rank	School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
1	Lafayette	2.0	1.0	5.4	5.4	86.2	13.8
2	Shields Heights	4.0	0.3	7.4	21.4	66.9	33.1
3	Hillcrest	5.1	0.8	5.6	4.0	84.5	15.5
4	Arthur	5.7	1.8	8.6	4.1	79.8	20.2
5	Rancho Village	5.8	1.2	4.0	5.2	83.8	16.2
6	Prairie Queen	6.2	2.2	4.3	2.6	84.7	15.3
7	Parmelee	6.3	1.8	8.3	4.6	79.0	21.0
8.5	Davis	6.6	6.0	6.6	15.7	65.1	34.9
8.5	Willard	6.6	3.9	19.7	28.3	41.5	58.5
10	Coolidge	7.3	3.6	5.7	2.3	81.1	18.9
11	Buchanan	7.5	3.7	3.0	5.8	80.0	20.0
12	Lee	7.7	1.3	11.0	24.5	55.5	44.5
13	Southern Hills	8.0	5.1	1.1	6.8	79.0	21.0
14	Van Buren	8.4	0.9	11.9	3.1	75.7	24.3

Rank	School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
15	Adams	8.5	0.0	4.5	7.0	80.0	20.0
16	Fillmore	8.7	1.5	3.3	5.7	80.8	19.2
17	Linwood	9.2	1.4	3.3	1.0	85.1	14.9
18	Wheeler	10.0	1.1	8.3	18.9	61.7	38.3
19	Madison	10.5	3.3	2.9	5.3	78.0	22.0
20.5	Hayes	10.7	0.0	4.9	3.4	81.0	19.0
20.5	Mark Twain	10.7	0.0	10.7	10.7	67.9	32.1
22	Heronville	11.0	0.7	8.2	15.4	64.7	35.3
23	Kaiser	11.9	2.3	0.5	4.0	81.3	18.7
24	Quail Creek	13.2	0.5	0.5	0.5	85.3	14.7
25	Columbus	14.9	1.3	9.5	23.5	50.8	49.2
26.4	Pierce	16.7	0.0	5.0	10.4	67.9	32.1
26.5	Sequoyah	16.7	1.2	4.4	4.4	73.3	26.7
28	Ridgeview	16.9	0.7	0.7	0.7	81.0	19.0
29	Hawthorne	17.2	8.1	9.7	12.9	52.1	47.9
30	Monroe	19.1	3.2	1.2	3.2	73.3	26.7
31	West Nichols Hills	21.7	1.5	2.2	1.1	73.5	26.5

Rank	School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
32	Westwood	22.3	0.5	6.8	20.9	49.5	50.5
33	Stand Watie	24.8	1.8	7.7	15.0	50.7	49.3
34	Johnson	27.0	0.7	1.3	6.5	64.5	35.5
35.5	Gatewood	30.7	12.1	3.7	10.5	43.0	57.0
35.5	Horace Mann	30.7	4.3	2.7	3.2	59.1	40.9
37	Stonegate	31.0	2.3	0.6	1.6	64.5	35.5
38	Putnam Heights	31.1	9.8	4.0	5.1	50.0	50.0
39.5	Eugene Field	31.3	4.7	9.8	26.5	27.7	72.3
39.5	Wilson	31.3	11.2	4.6	6.6	46.3	53.7
41	Bodine	32.7	1.9	3.2	1.4	60.8	39.2
42	Arcadia	35.6	0.0	6.9	2.8	54.7	45.3
43	Shidler	35.9	0.0	5.9	28.9	29.3	70.7
44	Britton	36.5	1.7	1.7	1.7	58.4	41.6
45	Rockwood	39.0	0.7	6.6	11.1	42.6	57.4
46	Harrison	41.6	0.7	1.3	3.9	52.5	47.5
47	Oakridge	43.5	1.5	3.0	1.5	50.5	49.5
48	Willow Brook	46.3	1.2	1.2	2.7	48.6	51.4
49	Star	54.5	0.0	1.2	0.3	44.0	56.0

Rank	School	% Black	% Oriental	% Indian	% Spanish	% White	% Non-White
50	Telstar	55.8	1.7	3.3	2.1	37.1	62.9
51	Edgemere	56.3	19.3	2.7	6.0	15.7	84.3
52	Western Village	60.0	3.8	0.6	0.9	34.7	65.3
53	Spencer	71.6	0.6	1.4	0.6	25.8	74.2
54	North Highland	96.3	0.9	0.0	0.0	2.8	97.2
55	Dewey	96.6	0.4	0.0	0.0	3.0	97.0
56	Lincoln	97.2	1.0	0.6	0.0	1.2	98.8
57	Parker	97.3	0.0	0.9	0.5	1.3	98.7
58	Polk	98.4	0.4	0.0	0.0	1.2	98.8
59	Truman	98.7	0.0	0.0	0.0	1.3	98.7
60.5	Creston Hills	99.0	0.0	0.0	0.0	1.0	99.0
60.5	Garden Oaks	99.0	0.5	0.0	0.0	0.5	99.5
62	Edwards	99.5	0.0	0.0	0.0	0.5	99.5
63	Longfellow	99.6	0.0	0.4	0.0	0.0	100.0
64	King	99.7	0.0	0.3	0.0	0.0	100.0
District Elementary Students		36.0	2.3	4.2	6.8	50.7	49.3

DEFENDANT'S EXHIBIT 67

Student Population by Race, 1970-1986

Total Enrollment for Oklahoma City Public Schools All Schools

Year	Black Students	Non-Black Students	Total Students	Percent Black	Percent Change in Non-Blacks
1970	16,256	54,833	71,089	22.9	–
1971	16,122	52,718	68,840	23.4	-3.9
1972	16,028	44,646	60,674	26.4	-15.3
1973	14,490	39,706	54,196	26.7	-11.1
1974	14,740	37,403	52,143	28.3	-5.8
1975	14,879	35,283	50,162	29.7	-5.7
1976	14,888	33,053	47,941	31.1	-6.3
1977	14,959	31,315	46,274	32.3	-5.3
1978	14,971	29,291	44,262	33.8	-6.5
1979	14,779	27,692	42,471	34.8	-3.6
1980	14,456	26,505	40,961	35.3	-4.3
1981	14,473	26,304	40,777	35.5	-0.8
1982	14,710	26,717	41,427	35.5	1.6
1983	14,858	25,655	40,513	36.7	-4.0
1984	15,466	24,907	40,373	38.3	-2.9
1985	15,504	24,670	40,174	38.6	-1.0
1986	15,648	24,189	39,837	39.3	-1.9

Source: Oklahoma City Public Schools membership records.

DEFENDANT'S EXHIBIT 76

Minutes, July 2, 1984 School Board Meeting

THE BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NUMBER 89 OF OKLAHOMA COUNTY, OKLAHOMA, MET IN A REGULAR MEETING IN THE BOARD ROOM, ADMINISTRATION BUILDING, 900 NORTH KLEIN, MONDAY, JULY 2, 1984 AT 7:00 P.M.

Present:	Susan Hermes	President
	LaRue Donwerth	Vice President
	Jean Brody	Member
	Paul Heath	Member
	Betty Hill	Member
	Hugh Long	Member
	Clyde Muse	Member

Others present: Don Wright, Superintendent; Darrel Shepard, Clerk; Ronald Day, Attorney; Don Ladd, Treasurer; Central Office staff members, representatives from professional groups, the news media and other interested persons.

* * *

UNFINISHED BUSINESS

1. The first item of Unfinished Business was consideration to designate Bodine Elementary School as a "stand-alone school", to include grades K, 1, 2, 3, 4, and 5, beginning with the 1984-85 school year.

   Pat Watson, Director of Planning, Research and Evaluation, gave a brief synopsis of the written report as

presented to the Board, dated June 26, 1984. She stated the report dealt with K-4 stand alone and K-5 stand alone schools. There are currently three K-4 stand alone schools in the District, Harrison, Edgemere, and Western Village. By board action this fiscal year, Rockwood will also become a K-4 because the only feeder zone was moved to another school due to low bus ridership. The report also dealt with the proposed 1984-85 Bodine K-4 as one option.

The second part of the report addressed K-5 stand alone schools, which do not send students to fifth year centers, but where students remain in their neighborhoods. Currently, Arcadia and Horace Mann are K-5 stand alone, and Rockwood and Bodine K-5 stand alones are options for 1984-85.

Mrs. Hill asked if and when staff would be recommending Rockwood as a stand alone. Dr. Wright responded that at this point in time staff hasn't fully considered it; but the information on Rockwood is contained in the report.

Dr. Muse asked if Horace Mann and Arcadia were considered stand alone based on the same criteria. Mrs. Watson said Arcadia's stand alone status was based on different criteria because of its isolated location; however, the racial balance was in compliance. Horace Mann has been a stand alone K-5 since the inception of the Finger Plan.

Continuing with the report, John Fink, Research Associate, discussed the K-4 portion of the report as follows:

"For Bodine to become a K-4 stand alone would involve reassigning the feeder students from the Creston Hills area currently attending Bodine to Hayes. Approximately 11 students would have to be reassigned, all of whom are black. The reassignment of these 11 students would really have no impact on the capacity at either Bodine or Hayes. The Creston Hills students would

travel an additional two miles, but it would be shorter time for them because of access to the freeway. Recall that the Creston Hills students are currently assigned to three elementary schools. The assignment would be to Hayes and Oakridge. No elementary and fifth year clusters would be broken with this plan. All schools would remain in compliance with the policy on racial balance. There would be no transportation savings for the district with this plan.

"Let us now consider a K-4 stand alone at Rockwood. Currently, fifth grade students who reside in the Rockwood neighborhood are assigned to Longfellow or Page Woodson. If Rockwood were to be made a K-5 stand alone school, approximately 81 students would have to be reassigned; 23 black students, 58 non-black students. There, is adequate capacity at Rockwood to allow for these additional 80 or so students. Two portables would be freed up at Longfellow from this reassignment that could be used elsewhere. Again with this reassignment, all schools would remain in compliance with Policy JC regarding racial balance; i.e., no need to adjust Longfellow or Page Woodson. Both schools would remain in compliance, even though the fifth grade students from the Mark Twain neighborhood were brought back to their stand alone area. Approximate annual savings in transportation costs to the District, $18,000.

Belinda Biscoe, Research Associate, reported on the K-5 options:

"This will be a summary of what we talked about at the last Board Meeting, which was the feasibility of making Bodine a K-5 stand alone for the next school year. The number of reassignments would total 146 students; 49 black students, and 97 non-black students. In terms of capacity, Bodine would need an additional four

portables. The students who are currently assigned to Bodine from the Creston Hills neighborhood were recommended to be reassigned to Hayes. Hayes does have adequate capacity to accommodate those students. The travel distance would be two miles further for the Creston Hills students, but there is less travel time because there is access to the freeway. Once the Bodine students are taken from Creston Hills, Creston Hills would then be out of compliance in terms of Policies JC and FL on racial balance and school closing criteria. In order to balance Creston Hills, the recommendation was made to take the fifth year students in the Mark Twain neighborhood and reassign those students to Creston Hills. If those students were reassigned to Creston Hills, they would be one mile closer to their homes compared to their current reassignment of Longfellow. Once all these reassignments are made, all of the schools would then be in compliance with the policy on racial balance. In terms of savings for transportation, the District would save approximately $18,000 a year, which is the equivalent of one bus."

There was discussion of the cost of moving portables and demountables versus the savings in transportation. Dr. Muse stated spending $20,000 to move four portables did not represent an $18,000 savings to him. Mrs. Watson replied the transportation savings would be annual as opposed to a one-time expense for moving the portables.

Ms. Brody asked for clarification on the number of portables needed at Bodine before and after the new classroom addition. After the addition is completed, nine portables will be needed. Before the addition, if Bodine becomes a K-5 stand alone, four classrooms would be needed in addition to the 14 portables already there. Dr. Wright said the plan was to use one

demountable, which is the equivalent of three classrooms, and one portable. Dr. Biscoe said once the addition is completed, nine portables would be moved out. Dr. Wright mentioned that whether Bodine is left as it is or made a K-4 or K-5, the demountable would be needed there for the future because of the growing population of that area.

Mrs. Watson concluded the Research Department's report. She spoke concerning why two schools, Bodine and Rockwood, were being considered for K-4 or K-5 stand alone status as follows:

"Our charge was to look at the entire district for schools that could qualify as stand alone K-4 or K-5. As we looked at all the schools in the District, these two popped out for these reasons: Low ridership in the Rockwood area was a reason for establishing a K-4. The Board took that action, so we have eliminated having just a few students on a bus being the only feeder zone into Rockwood. At Bodine, the overcrowding has been an issue and it is currently racially balanced. Eleven students are not going to make a large difference, but it would somewhat relieve the overcrowding.

"As we look at K-5 schools, these two schools also pop out again because they are in integrated neighborhoods and they are farther from fifth year centers than other schools that we looked at. The transportation, because of their distance, is an issue of students' time on the bus as well as cost. The reassignment of fifth graders would not seriously impact the fifth year centers that these students are assigned to."

Jesse Lindley, Assistant Superintendent for Educational Services, then presented a report on comparison of the instructional programs at Horace Mann (stand alone K-5) and Polk Fifth Year Center as follows:

"Basically, there are differences between the two programs in that you have more students in a grade at Polk than you do at Horace Mann. There are some things you can do when you have more students in a grade than you can when you have just one class. We have one and a fraction classes of fifth grades at Horace Mann.

"In summarizing the differences, we do have a Chapter I Lab at Polk, which we don't have at Horace Mann, but that's because Horace Mann doesn't qualify for Chapter I services. We do have a visual arts program in all the fifth year centers. We have not been providing that at the stand alone school. This year, it was provided because there was some free time available on the schedule of the artist-in-residence. Both schools have the vocal music programs. Polk has a string program, which Horace Mann does not. (The string program) is the special feature of the 5th year centers.

"Another feature of the fifth year centers program which is available at Polk and which is not available at Horace Mann, is the special interest sessions. In the special interest sessions, students are spread out over a number of interests that they may have; typing, creative writing, newspaper – whatever the students are interested in. They spend approximately 50 minutes per week pursuing that special interest."

"Both Horace Mann students and Polk students have the career awareness program. Both have Opening Doors programs. Both have the physical education program. With regard to an intramural program, Polk does have an intramural program that Horace Mann does not, and that's primarily a function of the number of students available, which makes it possible to have an intramural program at Polk. There are such few

students at Horace Mann in the fifth grade that you can't very well have an intramural program."

In response to questions from Dr. Heath and Mrs. Donwerth, Mrs. Watson stated there were 55 fifth year students at Horace Mann, 293 at Polk, nine at Arcadia; and that there has been no study done comparing the test scores of the Polk and Horace Mann fifth graders.

Mrs. Hermes asked what, if any, of the fifth year programs would be at Bodine if it became a K-5 stand alone. Dr. Lindley said staff would not recommend that the visual arts program or the strings program be instituted at Bodine. He said having an intramural program would depend on whether there were enough students in the fifth grade and whether the principal and staff there wanted to sponsor it. He said the special interest sessions would be somewhat dependent upon the school staff and whether they were willing to assume the responsibility for it.

Mrs. Donwerth asked what the rationale was for not including the visual arts or strings programs at Bodine. Dr. Lindley stated that when the fifth year centers were established, they were made unique in order to provide something that was not available in other schools. He said over the years there has been a push to provide some of those things at the other schools, for example, physical education and vocal music. He said it was the Board's prerogative to change that direction if they saw fit.

Mrs. Donwerth said she had a problem with punishing a group of students because they are in a naturally integrated neighborhood by not providing some of the programs contained in the fifth year centers; however she did think some type of uniqueness should be maintained in the fifth year centers.

Mr. Long made a statement concerning the special fifth year centers programs. He felt all fifth grade

students should receive the services that those in fifth year centers do, and that it was unfair to the students at Horace Mann right now that they do not.

Ms. Brody asked what the original rational was for keeping Horace Mann a K-5 school in the original court order. Mrs. Watson responded with a brief history as follows: "In 1972 there were 11 schools that were allowed by the court to remain K-5 neighborhood schools based on the spring projections. However, three of those, including Arcadia, started the school year exceeding the black/other ratio that was anticipated. In 1974, Nichols Hills was made a K-4; it was an original K-5. North Highlands was changed from a K-5 to a fifth year center. Overcrowding at Edgemere caused it to drop off the list, becoming a K-4 in 78-79. In 1980-81, looking at the racial balance in all the schools, all the schools dropped off except Arcadia by reason of location, and Horace Mann by reason of natural integration. Horace Mann was one neighborhood that was naturally integrated, and it was a board member's recommendation to keep it as a K-5. At that time, the long range planning committee had spoken to discontinuing K-5's, but that was not a unanimous decision, and the Board decided to leave Horace Mann as a K-5."

Hearings

The following persons addressed the Board concerning the recommendation to designate Bodine Elementary School a K-5 stand alone for 1984-85:

1. Jerry Ellington, representing neighborhood watch association and surrounding Bodine neighborhood
2. Don Johnson, Patron
3. Leonard Benton, Urban League of Greater Oklahoma City
4. Pat Musgrave, Patron

Mr. Ellington spoke in opposition to busing and in support of the recommendation to designate Bodine a stand alone K-5. He presented the Board with a petition signed by approximately 337 patrons who supported the recommendation.

Mr. Johnson stated he believed the Finger Plan was working; and felt a comprehensive study should be conducted and a plan developed to effect a smooth transition before Bodine is to become a stand alone school.

Mr. Benton expressed concern that if a trend toward K-5 stand alone schools continued, the northeast quadrant would see more and more fifth year centers close. He said alternatives should be explored, including re-establishment of elementary schools in the northeast quadrant that would have the chance to become stand alone.

Ms. Musgrave said she though it was time the District started looking at solutions to Bodine's problems.

Mrs. Donwerth made the motion, seconded by Mr. Long, to designate Bodine Elementary School as a stand alone K-5 school beginning with the 1984-85 school year.

Dr. Heath then moved that the motion be amended to reflect that Bodine Elementary School be designated a stand alone K-4 school beginning the 1984-85 school year. The motion was seconded by Dr. Muse.

Prior to voting on the amended motion, Board members made the following (edited) statements:

(Dr. Muse) "There are at least four things that I think ought to be considered as we think about moving to the posture of stand alone schools in our community. As it relates to the Bodine situation, I would suggest to you that the proposal as it presently stands is educationally unsound. Don Johnson spoke to one of the primary deficiencies in the program in that you're moving from a 558 member student body to a 784

member student body. What Don Johnson did not suggest or add is that this transition is taking place while you are at the same time installing a new principal. We're moving from 14 portables to 18, and when the new $1 million addition is completed, we will still need 9 portables.

"While we are talking about only 11 students, these 11 students are human beings. They have formed acquaintances and alliances at their present educational site. Can we move them just as we would pawns, chips, inanimate objections? Is it just a matter of two and a half miles further, or does it involve the warm blooded innocent black children who are manipulated needlessly? As we think about the one-room school as we talk about portables, we need to keep in mind that there is a lot of folklore about the one-room school; but it did not include the demountable or the portable. When we lauded the one-room school, we were talking about something that was in the infancy of our nation.

"Fiscally, I think the recommendation is irresponsible. We're talking about $18,000, which is not, in fact, $18,000. Though day you may eliminate one bus, you're going to have to extend the use of another bus, and thoses buses don't run on air. You need to actually evaluate the actual amount of fuel and all that's involved before you can assess what the actual savings would be, even though you take one bus off. But then when you take into account that you must put in one demountable at $25,000 or four portables at $5,000 each, that, to me, does not sound like good fiscal management.

(Dr. Muse, cont'd) "Another problem with this whole proposal is it reeks with injustice. There is no equity in treatment as far as the students themselves are concerned. Mr. Benton has already spoken to the fact that the Finger Plan in its inception required all black kids, grades one through four, to be bused into the majority community. That fact alone stifles the

growth of the Northeast Quadrant. What parent with a pre-school child, who is aware that his child is going to have to be bused, would buy a home in that location?

"As you think about the overall program, it seems like it was a deliberate, concerted effort to deal injustice upon our community – and that's not enough, it seems. At every opportunity that comes along, one more stroke to further impoverish the Northeast Quadrant is taken, and I refer as a case in point to the recent decision to move the Cowboy Hall of Fame. So there seems to be a deliberate, concerted effort to see to it that not only will the black community or the Northeast Quadrant not integrate, there also seems to be a concerted effort on somebody's part to see that it always remains impoverished. Grade five kids were to be bused into the Northeast Quadrant, and then after that, into the middle schools and high schools which are scattered throughout the district. If we take out the 104 students out that are currently going to Creston Hills, that brings that school, with the 55 or whatever the number is that's going to be bused in, down to 188 fifth grade students. If the kindergarten program fluctuates or falters, Creston Hills gets on the closing list. And what's true of Creston Hills is true of Dewey, it's true of Garden Oaks, it's true of about 6 of the 13 fifth year centers that exist right now in the Northeast Quadrant. I suggest to you that that is simply not justice.

"The final thing that I think we need to consider relates to No. 7 of our Board Goals. We said that we want to be careful to institute programs that have human relations and public relations value. If by "human" we mean all humans, and if by "public" we mean all of the public, then we need to recognize that this recommendation is a human relations and public relations disaster because it does not promote good feelings for the school district in the black community. I think that what we really ought to do is have a study that tells us how far we've come. It ought to

take into account demographic information, all of the kinds of projections that we are so capable of gathering; a concerted, planned, strategy-developed, step-by-step (plan), followed to enhance educational offerings for all of the students in all of this district; I do not believe that we ought to piecemeal it and place this district in the posture of having to react rather than act, and that's exactly what we're doing if we pass this recommendation because it is just a matter of time before the pressure begins to mount and you will have to move some more schools into the stand alone posture."

(Mrs. Donwerth) "I understand where Dr. Muse is coming from; my concern is we hear a lot about the black community and what their thoughts are on this. I'm curious to know if that is a geographical area when we refer to the black community or if are we referring to the black population. I really feel like we're talking about moving only 11 students versus 104 students including many black students. I think the $18,000 is the yearly cost savings (of bus transportation). I don't think these parents and these students should be punished because of the overcrowding at Bodine. They had nothing to do with the fact that we don't have the money to build them a gigantic school to house their children in – I'm sure they'd love that. I was thrilled that we were able to get through a million dollar addition (at Bodine).

"I've been in the school system for several years. To me, the court order was designated because there were inadequacies and inequities in education throughout Oklahoma City. Our children have had to pay the price for that – for what the adults did. Our kids have had to suffer the ills of society. I would suggest that we can no longer be considered about geographical areas; we have to be concerned about kids in this district, and what is best for (all of the) kids. I feel like that's what the court order (Mrs. Donwerth, cont'd) was all about. I think we should celebrate the fact that this community has integrated

naturally. I feel like its a slap in the face to those of us who have stayed with the District and not moved out to other areas and have tried to raise our kids in Oklahoma City schools, and there are many of us that have done that and worked to help build the school system because we believed right was right and wrong was wrong. I don't think two wrongs make a right, and that is why I am excited about the Bodine School.

"Dr. Muse alluded to Creston Hills and placing them on the closing criteria. With the plan the staff has provided for us, this would not come about. They would receive students from another area that would keep them above the closing criteria. That is why I am encouraging the Board Members to support this move."

(Dr. Heath) "I would like to discourage the passing of the original motion for educational reasons. To me, after looking at the criteria and the information that the staff has prepared, I, frankly, have changed my mind in terms of what is educationally best for the district as a whole. I can't support the motion for K-5; obviously, I can support the concept K-4 because it is, I think , in the long run meeting the Board's goals and educational needs of the community. I think it will cost considerably more to go to K-5. I think it will impact the total district in a way that the District is not ready to address. I don't feel staff is really ready to address it, and I don't think this Board is really ready to address the ultimate impact of starting down a road when we really don't know where the road leads. I want to encourage those of you who don't have your mind made up to consider my amended motion K-4 instead of K-5 for educational reasons."

(Ms. Brody) "I've been in this school system 18 years, and this is the first time I've sat in this auditorium, either as a Board member or a patron, when we discussed changing of transportation plans and school assignments, and I would like to compliment

the people in the auditorium on their effect. I think it's a sign of growth of this system. I'm kind of proud of all of you. It's (like) we've grown up together.

"I'm at a real dilemma. Dr. Ellington talked about the fifth year center and the lack of continuity. I rarely will bring up experiences, but my children all went to the fifth year centers and I think they are extraordinarily fine. They went the first year, the third year, and the sixth year of the Finger Plan, and we all learned together. But I also represent a district that has stand alone schools. I have Arcadia, which is unique, and I have two elementary schools, K-4, that are stand alone. Mr. Long and I both have students at John Marshall, which is a stand alone high school. Frankly, we are very proud of that and the neighborhoods and what that has represented and the growth in the Northeast Quadrant.

"I have a problem with the diminution of the fifth year centers because I am – a strong advocate of them. I would not ever again want to sit here and decide to create another fifth year center until we have done a long, comprehensive plan. I would like to see if it's possible to put a K-5 school in the Northeast Quadrant. We've never really looked at that very hard, but I think that certainly we should look at that. I especially think a comprehensive look needs to be taken at where we are as far as demographics and things like that. I don't think we should ever again create a K-5 stand alone school until we've done that.

"I'm concerned that during the Rockwood discussion I kept hearing about Mark Twain students. 'Stand alone' is 'stand alone'. I have come a long way in the consideration of Bodine Elementary, and it has not been easy. I think that's why I appreciate (the parents) affect up here today, and I will support the K through 5 concept at Bodine, but it's the last time until we go a comprehensive study. I do want a comprehensive study looking at the Northeast Quadrant."

(Mrs. Hill) "I find myself in a big dilemma, having been on the Board as long as I have. I have probably spent more hours than most Board members, especially with Clyde and LaRue, as we've debated this back and forth. I'll probably go back to my original concept. If you'll all remember, the original purpose of the Finger Plan called for the integration of neighborhoods and allowed for additional stand alone schools. I've lost some in my area, and as we've talked about Rockwood tonight, which is in my area, I'm really disturbed to think that staff and the Superintendent would recommend Bodine and not both Bodine and Rockwell. I see this as a very peicemeal [sic] way of doing things, and I don't think this board does things in a piecemeal fashion.

"I then have to look at the other side of the coin and ask if I should penalize the parents from Bodine because they have reached the status of a K-5 integrated neighborhood. I do believe that if we are going to have K-5 schools they must be for everyone – we cannot just pick and choose. This, of course, would give us basically two K-5 schools. I think I'm hearing the Board say Rockwood is not gong to make it, and this is sad. I guess I've always believed in stand alone schools, so that's probably where I'm coming from, but I really am disappointed that we're going to have to piecemeal it. I, too, think this board needs to do a study so that we can look at some other alternatives to see what will best benefit the kids in Oklahoma City. I'm hoping that maybe that is where we will end up."

Voting on the amended motion, on roll call the votes were as follows: Ms. Brody, no; Mr. Long, no; Mrs. Hill, no; Mrs. Donwerth, no; Dr. Muse, aye; Dr. Heath, aye; Mrs. Hermes, aye. Three aye, four no. Mrs. Hermes declared the motion failed.

On roll call for the original motion, the votes were as follows: Ms. Brody, aye; Mr. Long, aye; Mrs. Hill, aye; Mrs. Donwerth, aye; Dr. Muse, no; Dr. Heath, no;

Mrs. Hermes, no. Four aye, three no. Mrs. Hermes declared the motion carried.

Mrs. Hermes passed the gavel to Mrs. Donwerth, Vice President, and made the following motion:

"I move that we begin a study right now on the racial progress in the I-89 school district, and ask the committee to bring back to the Board its recommendations next year. I think that this Board needs to look at that at the same time we look at potential school closings."

The motion was seconded by Ms. Brody, and is for action at the next regular Board Meeting, July 16, 1984.

Dr. Muse made the following motion, for action July 16, 1984:

"I move that we also make Lincoln a stand alone K-5 school."

The motion was seconded by Ms. Brody.

Mrs. Hill then made the following motion, for action July 16, 1984:

"I move that we consider Rockwood as a stand alone K-5 because it does not involve moving any students."

The motion was seconded by Mrs. Donwerth.

DEFENDANT'S EXHIBIT 79

Minutes, November 19, 1984 School Board Meeting

THE BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NUMBER 89 OF OKLAHOMA COUNTY, OKLAHOMA, MET IN A REGULAR MEETING IN THE BOARD ROOM, ADMINISTRATION BUILDING, 900 NORTH KLEIN, MONDAY, NOVEMBER 19, 1984 AT 7:00 P.M.

PRESENT:	Susan Hermes	President
	LaRue Donwerth	Vice President
	Jean Brody	Member
	Paul Heath	Member
	Betty Hill	Member
	Hugh Long	Member
	Clyde Muse	Member

Others present: Don Wright, Superintendent; Darrel Shepard, Clerk; Ron Day, Attorney, Central Office staff members, representative from professional groups, the news media and other interested persons.

* * *

Special Report – Board Committee Report on Student Assignment

With Mrs. Donwerth presiding, Dr. Muse, Mrs. Hermes, and Mrs. Hill presented their report as follows:

(Dr. Muse) "In July of 1984, we as members of the Oklahoma City School Board charged ourselves with the responsibility of studying the I-89 elementary K-5 grade schools. We investigated elementary grade schools with regard to

neighborhood racial makeup, potential busing reduction, possible boundary changes, and possible grade realignments. Although many options were explored, we will first present the one that was most feasible. Other options will be discussed briefly at the end of our report.

"Our purpose in undertaking this study was multi-faceted. First, we wanted to know if we could maintain a unitary school system. Second, we wanted to establish K-4 schools in the northeast section of the district where there are none currently. Third, we wanted to look at the effects of creating more K-5 stand-alone schools. Fourth, we wanted to maintain K-4 neighborhood schools with stability. Fifth, we wanted to increase pride and parental involvement in all out schools. And last, but of utmost importance to our board, we wanted to continue to be an integrated school district in an urban setting.

(Mrs. Hermes) "Now let's look at the specifics of this plan. At the elementary level, the plan calls for K-4 neighborhood schools throughout the district. Please note pages 5 and 6 of your booklets, titled Proposed Student Assignment Plan. On the overhead, all the schools shown would become neighborhood K-4 schools. Please note that under this plan, all of the fifth year centers, which are in the Northeast Quadrant, would become K-4 neighborhood schools. In addition, all of the current K-5 schools, Arcadia, Bodine, and Horace Mann, would become K-4 neighborhood schools.

"In arriving at a plan for fifth year centers, we divided the district into four sections. We will be referring to these sections as number 1, 2, 3, and 4. Note that Arcadia is in section 2. Our plan calls for one fifth year center in sections 1, 2, and 3, with two fifth year centers in section 4 where there are many more students.

"In section 1, Green Pastures is recommended as the fifth year center for the Star Spencer area. All the students currently at Parker would be reassigned to Green Pastures, as Parker would become a K-4 neighborhood school under this plan. K-4 students in the Green Pastures attendance area would all be reassigned to Spencer Elementary. Green Pastures was selected primarily for reasons of centrality.

"Eisenhower is the recommended fifth year center for section 2. Eisenhower was chosen in preference to Hoover because we felt it would be better to transport the majority of students at the fifth year level for one year as opposed to three years of busing for middle school.

"Classen is the recommended fifth year center in section 3. The Classen High School age population is not currently nor in the future predicted to be large enough to support as comprehensive a program as can be offered to a larger student body. Therefore, we felt that the facility could better be utilized as a fifth year center. In addition, the Classen building is desirable as a fifth year center location with reduced transportation and more space.

"Two fifth year centers are recommended in section 4 since there are many more fifth year students in this area. We propose converting both Capital Hill Middle and Webster Middle into fifth year centers. Capital Hill Middle is proposed because it has the space, a swimming pool, large auditorium, and a location that can allow us to reduce transportation for more students.

"Webster is proposed as the second fifth year center site since its location is also excellent for reducing travel and housing the types of programs needed for fifth graders. There is also space at this site to build a pool."

(Mrs. Hill) "Since this proposed plan relocates students at a few middle schools and high schools, the next part of our report addresses the impact of these proposed recommendations at the middle school and high school levels. Let's first attend to the impact of the proposed plan at the middle school level.

"If both Webster and Capital Hill Middle become fifth year centers, students from these schools would have to be reassigned among the current middle schools in the southern part of the district, Jackson, Jefferson, and Roosevelt. Since the remaining middle schools could not totally absorb all the students from Capitol Hill Middle School and Webster, a new middle school would have to be created, Southeast High School was the logical choice since it was originally designed to be a junior high school, but has housed high school students. It is large enough to accommodate a large number of middle school students and is in a strategic location to reduce transportation. As a result of not wanting to adversely impact any one middle school's enrollment or black/other ratio, displaced students from Capital Hill Middle School and Webster Middle School would be reassigned among all middle schools in the south. All middle schools would remain racially balanced under this plan.

"Now let's focus on the high school assignments. Under the proposed plan, Classen High School would be converted into a fifth year center, and Southeast High School would be converted into a middle school. The attendance areas and zones assigned to Classen and Southeast High School can be absorbed at Grant, Capitol Hill High, Douglass, Northeast, and Northwest Classen. All of the high schools would continue to be racially balanced.

"We feel that there are many benefits to this proposed plan, not only for our students and parents, but also for the community at large. The implementation of this plan will provide neighborhood schools, K-4, establish fifth year centers in all areas, reduce busing, improve programs, increase parents' participation, and increase community involvement and support.

"There were other options explored that seemed less desirable. We will briefly discuss these. One alternative would establish K-5 or K-6 neighborhood schools. One major drawback to either plan is building capacity. More programs are being offered to meet the special needs of students than in past years. We do not have the facilities to house K-5 or K-6 at many of our elementary schools, much less allow for any growth in the student population, and many would have to close due to low enrollment. Further the Board feels that the fifth grade is the latest point in a student's education where integration needs to occur for us to have a positive inter-racial climate in a unified, desegregated district. The Board is also committed to the fifth year concept where we could offer a unique and comprehensive educational program for students.

"Another option would be for us to continue with our present policy and as neighborhoods become more integrated, convert K-4 schools to K-5 neighborhood schools. This option would continue to call for students at K-4 schools to attend fifth year centers in the Northeast Quadrant of the district and would not allow for residents in the Northeast Quadrant to have neighborhood schools."

(Dr. Muse) "In closing our report, let me reiterate that the Board's plan for elementary students establishes K-4 neighborhood schools in

all areas of the district with five fifth year centers also located in all sections of the district. We feel that this plan maintains a unified and desegregated schools district, yet allows for reduced busing, improved educational programs, increased opportunity for parental involvement, and increased community involvement and support."

Dr. Muse then made a motion that the Board of Education vote on the three options presented by the Board Committee on December 17, 1984. In the meantime, meetings would be held across the district to inform the public. The motion was seconded by Dr. Heath. On roll call the votes were as follows: Ms. Brody, aye; Mr. Long, aye; Mrs. Hill, aye; Mrs. Donwerth, aye; Dr. Muse, aye; Dr. Heath, aye; Mrs. Hermes, aye. All aye.

Mrs. Donwerth stated the plan was the committee's proposal, not necessarily that of the full board.

Ms. Brody commented that the Board and Administration would have to be very sensitive to the feelings of students and patrons as they met with the community to discuss the plan. She also said when the agreement (with the teachers) was negotiated it was done so without the knowledge that schools might be changed around. She wanted to know how the contract would affect transfers of teachers as well as classified personnel should the plan be implemented. Ms. Brody addressed the group from Southeast High School and stated she knew it had been traumatic for them as they learned of the proposed plan.

Dr. Heath suggested one way of disseminating accurate information to the community about the plan would be to have a "phone bank" set up and staffed by qualified

persons. Mrs. Hermes responded that it was already being arranged.

Mrs. Hermes remarked that the Board Committee had spent many hours since the committee was formed in July working with the Research Department, looking at all the options. She said she knew change was painful; that this was the best plan the committee could come up with that would continue an integrated system while allowing more neighborhood schools and reduced busing. She encouraged the patrons and students to attend the "town meetings" scheduled for November 26 and 27, 1984. She announced that a Special Meeting was scheduled for December 10, 1984 for public hearings prior to the Board's voting on the three options on December 17, 1984.

Mrs. Donwerth said she believed the concept of the plan was good; however, she was concerned about the students, patrons and teachers of Southeast High School. She thought there were a lot of questions that had not been answered yet, but that the Board was trying to look at the overall good of the district. She said board members would work with the community and spend as much time with them as possible.

Dr. Heath also pointed out that the committee had studied the plans very carefully, but invited anyone with an alternate plan to present it to the Board.

* * *

DEFENDANT'S EXHIBIT 108

Majority-To-Minority Transfers

May 6, 1987

OKLAHOMA CITY PUBLIC SCHOOLS

TRANSFER DATA

Table 1

One-year Kindergarten Option
(Computer code "M01")

Year	Grade	# Black	# Other	Total
1984-85	K	38	60	98
1986-87	K	36	40	76
TOTALS		74	100	174

Table 2

Majority to Minority Transfer Option, 1985-86
(Computer Codes "NO1," "NO2," and "NO3")

Year	Grade	# Black	# Other	Total
1985-86	K	14	4	18
	1	54	4	58
	2	96	2	98
	3	73	5	78
	4	76	4	80
TOTALS		313	19	332

Table 3

Majority to Minority Transfer Option, 1986-87
(Computer Codes "NO1," "NO2," and "NO3")

Year	Grade	# Black	# Other	Total
1986-87	K	4	2	6
	1	17	2	19
	2	38	3	41
	3	61	4	65
	4	46	4	50
TOTALS		166	15	181

Source: Oklahoma City Public Schools computer files, 1984-85, 1985-86, 1986-87

DEFENDANT'S EXHIBIT 119

Extracurricular Activities Report – High Schools

OKLAHOMA CITY PUBLIC SCHOOLS
HIGH SCHOOLS
EXTRACURRICULAR ACTIVITIES REPORT

	1976-77			1986-87		
	Non-Black	Black	% Black	Non-Black	Black	& Black
1. Cheerleaders	50	27	35.1	62	44	41.5
2. Student Council Members	285	146	33.9	143	123	46.2
3. Student Council Officers	36	19	34.5	33	28	45.9
4. Band Members	463	269	36.7	213	267	55.6
5. Pep Club	1010	221	17.9	58	58	50.0
6. Pep Club Officers	76	12	13.6	7	13	65.0
7. Freshman Class Officers	18	13	41.9	26	19	42.2
8. Sophomore Class Officers	22	12	35.3	25	9	26.5
9. Junior Class Officers	28	19	40.4	15	21	58.3
10. Senior Class Officers	26	20	43.5	22	32	59.3
Athletics						
11. Football	510	336	39.7	110	191	63.5
12. Football 9th	–	–	–	–	–	–
13. Boys Basketball	96	258	72.9	26	233	89.9
14. Girls Basketball	98	105	51.7	22	175	88.8
15. Wrestling	158	36	18.6	90	105	53.9
16. Cross Country	88	25	22.1	70	64	47.8
17. Boys Track	75	100	57.1	21	112	84.2
18. Girls Track	47	96	67.1	26	135	83.9
19. Boys Tennis	152	10	6.2	73	9	10.9
20. Girls Tennis	109	13	10.7	109	4	3.5
21. Swimming	151	17	10.1	130	5	3.7
22. Golf	96	5	4.9	86	8	8.5
23. Gymnastics	170	331	66.1	–	–	–
24. Baseball	147	61	29.3	162	62	27.7
25. Softball	130	62	32.3	75	109	38.4
TOTAL DISTRICT ENROLLMENT	4041	2213	35.4	1604	1826	53.2
	9897	4880	33.0	5773	4501	43.8

IRS
5/4/87

DEFENDANT'S EXHIBIT 120

Extracurricular Activities Report – Middle Schools

OKLAHOMA CITY PUBLIC SCHOOLS
MIDDLE SCHOOLS
EXTRACURRICULAR ACTIVITIES REPORT

	1976-77			1986-87		
	Non-Black	Black	% Black	Non-Black	Black	& Black
1. Cheerleaders	42	8	16.0	77	24	23.8
2. Student Council Members	157	103	39.6	150	116	43.6
3. Student Council Officers	2	2	50.0	16	22	57.9
4. Band Members	879	295	25.1	370	234	38.7
5. Pep Club	0	0	–	114	84	42.4
6. Pep Club Officers	0	0	–	7	1	12.5
Other Activities						
7. Volley Ball	45	60	57.1	63	89	58.6
8. Wrestling	115	61	34.7	110	76	40.9
9. Advanced Orchestra	18	5	21.7	114	36	24.0
10. Intermediate Orchestra	21	12	36.4	104	22	17.5
11. Advanced Band	48	38	44.2	280	197	41.3
12. Beginning Band	442	36	46.2	239	162	40.4
13. Boys Basketball	6	24	80.0	39	121	75.6
14. Girls Basketball	23	29	55.8	38	102	72.9
TOTAL DISTRICT ENROLLMENT	1398 7252	673 3586	33.4 33.1	1721 4914	1286 3299	42.8 40.2

IRS
5/4/87

DEFENDANT'S EXHIBIT 140

Parental Organization Statistics

PARENTAL ORGANIZATIONS AND ACTIVITIES*
OKLAHOMA CITY PUBLIC SCHOOLS

	1984-85	1985-86	1986-87
Numbers of Schools with Parent-Teacher Associations	15	28	42**
PTA Membership	1,377	2,476	3,358
Open House Attendance at Elementary Schools	11,478	15,231	16,645
Parent/Teacher Conference Day Attendance	11,250	14,025	14,995

*Source: State PTA Membership Records (attached); School District Records.

**After state PTA membership data was submitted, PTA units formed at 5 more schools bringing the total number of PTA units to 47 as of May 5, 1987. The membership in these 5 PTA units is 132. In addition to the 47 PTA units, 21 other schools in 1986-87 have Parent-Teacher Organizations (PTO's) with a membership of 1,571.

DEFENDANT'S EXHIBIT 142

Adopt-A-School Statistics

Adopt-A-School Program*

Oklahoma City Public Schools

	1984-85	1985-86	1986-87
Numbers of System-Wide Adopting Organizations	1	16	21
Number of Adopting Organizations	53	369	349**
(Number of Adoptions)	(111)	(378)	(522)
Elementary	16	137	239
Fifth Grade Centers	4	26	17
Middle Schools	4	140	48
High Schools	26	33	27
Special Centers	3	33	18

Value of Donated Services and Materials

Adopt-A-School as shown on p. 19, Statistical Profile	Data Not Maintained	$1,213,064	Current Estimate $1,000,000***
American Institute of Architects reported this amount after publication of Statistical Profile		467,916	
Total		$1,681,000	

*Source: 1985-86 Statistical Profile; Current School District Records

**American Institute of Architects (AIA) decreased actual number of architects involved in Adopt-A-School from 1985-86 to 1986-87 but increased number of projects from 1 to 5

***Final figures for the 1986-87 school year are yet to be compiled.

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1080

In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

vs.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONER

RONALD L. DAY*
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June 1, 1990

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Central to the resolution of the primary questions presented for review in this case is the answer to the most important unresolved question in desegregation law: What is the *effect* of a finding that a school system has achieved *unitary status*?

---

1. Should a compulsory desegregation decree remain operative after a formerly *de jure* school system achieves unitary status?

2. Does the traditional standard for dissolution of injunctive decrees involving private wrongdoers, as enunciated in *United States v. Swift and Co.*, 286 U.S. 106 (1932), govern the dissolution of school desegregation decrees?

3. Subsequent to the achievement of unitary status, do parties challenging school board action adopting an elementary neighborhood school plan which curtails compulsory busing have the burden of proving the board adopted the plan with discriminatory intent, or is the plan scrutinized by its racially disproportionate effect?

4. What affirmative desegregation obligations, if any, does a formerly *de jure* school system have following its elimination of official discrimination and the achievement of unitary status?

5. What are the proper criteria for determining whether unitary status has been maintained?

QUESTIONS PRESENTED – Continued

6. Did the court of appeals afford sufficient deference to the factual factings of the district court in compliance with *Anderson v. Bessemer City*, 470 U.S. 564, 575-576 (1985)?

THE PARTIES

1. The original plaintiffs and intervenors in this case were:

Robert L. Dowell, an infant under the age of 14 years of age, who sued by A.L. Dowell, his father as next friend, Vivial C. Dowell, a minor by her father, A.L. Dowell, as next friend; Edwina Houston Shelton, a minor, by her mother Gloria Burse; Gary Russell, a minor, by his father George Russell; Stephen S. Sanger, Jr , on behalf of himself and all others similarly situated; Jenny Mott McWilliams, a minor and David Johnson McWilliams, a minor, who sued by William Robert McWilliams, their father and next friend, on behalf of themselves and all others similarly situated; Renee Hendrickson, a minor, Bradford Hendrickson, a minor, Cindy Hendrickson, a minor, and Theresa Hendrickson, a minor, who sued by Donna P. Hendrickson, as mother and next friend of each of said minors, and Donna P. Hendrickson, individually, for themselves and all others similar situated; David Webster Verity, a minor, by and through his next friend George L. Verity, and George L. Verity and Ellen Verity, for themselves and all others similarly situated; Taejemo Danzie, a minor by and through Mrs. A.J. Danzie, her next friend, and Mrs. A.J. Danzie, for themselves and all others similarly situated.

2. The applicants for intervention who sought to reopen this case in 1985 were:

Yvonne Monet Elliott and Donnoil S. Elliott, both minor children, by and through their parent and guardian, Donald R. Elliott; Diallo K. McClarty, a minor child, by and through his parent and guardian, Donna R. McClarty; Donna Chaffin and

THE PARTIES – Continued

Floyd Edmun, both minor children, by and through their parent and guardian, Glenda Edmun; Chelle Luper Wilson, a minor child, by and through her parent and guardian, Clara Luper; Donna R. Johnson, Sharon R. Johnson, Kevin R. Johnson, and Jerry D. Johnson, all minor children, by and through their parent and guardian, Betty R. Walker; Lee Maur B. Edwards, a minor child, by and through his parent and guardian, Elrosa Edwards; Nina Hamilton, a minor child, by and through her parent and guardian, Leonard Hamilton; Jamie Davis, a minor child, by and through his parent and guardian, Etta T. Davis; and Romand Roach, a minor child, by and through his parent and guardian, Cornelia Roach.

3. The original defendants in this case were:

The Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma, a public body corporate; Jack F. Parker, Superintendent of the Oklahoma City Public Schools; M.J. Burr, Assistant Superintendent of Oklahoma City Public Schools; Melvin P. Rogers, Phil C. Bennett, William F. Lott, Mrs. Warren F. Welch, and Foster Estes, members of the Board of Education of Oklahoma City Public Schools, Independant School District No. 89, Oklahoma County, Oklahoma; William C. Haller, County Superintendent of Schools of Oklahoma County, Oklahoma.

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OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is reported at 890 F.2d 1483 (10th Cir. 1989). The opinion of the United States District Court for the Western District of Oklahoma is reported at 677 F.Supp. 1503 (W.D. Okl. 1987).

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on October 6, 1989. The Petition for Writ of Certiorari was granted on March 26, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The equal protection clause of the fourteenth amendment to the United States Constitution.

STATEMENT OF THE CASE

This case involves a formerly *de jure* school system which eliminated unlawful discrimination through sustained good-faith compliance with a court-ordered desegregation decree, and eight years subsequent to the achievement of unitary status, was persuaded by intervening demographic changes and educational considerations to adopt a neighborhood school plan, and curtail compulsory busing, for elementary students in grades 1-4. Since certain areas of Oklahoma City are residentially segregated, implementation of the new plan resulted in the enrollment at 11 of the system's 64 neighborhood elementary schools becoming greater than 90 percent black. Respondents challenged the racially disproportionate impact of the new plan, and this chapter of the litigation was opened.

1. History. – In Oklahoma, separate schools for blacks and whites were mandated by the state Constitution. In the wake of *Brown I*, however, the Oklahoma City School Board in 1955 adopted a neighborhood school policy based on "logically consistent geographical areas." *Dowell v. School Bd. of*

Oklahoma City, 244 F.Supp. 971, 976 (W.D. Okl. 1965).[1] This case was filed in 1961 after the school board adopted a special transfer policy which undermined the effectiveness of the neighborhood school system. Special transfers numbering from 4,000 to 5,000 each year allowed parents of white students living within an integrated neighborhood attendance area to transfer their children to all-white schools. *Dowell*, 219 F.Supp. 427, 446 (W. D. Okl. 1963). This transfer policy "naturally led to a higher percentage of segregation in those schools" which had become integrated. Thus, the special transfer policy was stricken down as unconstitutional. *Dowell*, 219 F.Supp. at 442.

The district court also found that when "making *initial* assignments", *Dowell*, 244 F.Supp. at 977 (emphasis added), the neighborhood school policy was inappropriate because it was superimposed over already existing residential segregation and "had the effect in *some* instances of locking the negro pupils into totally segregated schools." *Dowell*, 375 F.2d 158, 165 (10th Cir. 1967) (emphasis added). Residential segregation in Oklahoma City had been caused by "restrictive covenants", *Dowell*, 219 F.Supp. at 433, and "realtors, and financial institutions". *Dowell*, 244 F.Supp. at 975. "The [School] Board did *not* originate [the] patterns of residential racial segregation" which existed in Oklahoma City. *Dowell*, 307 F.Supp. 583, 594 (W.D. Okl. 1970) (emphasis added).

Throughout the 1960's the district court and the school board struggled with efforts to eliminate the vestiges of the dual school system. A number of "step-at-a-time plans" were implemented,[2] but without complete success. Subsequent to this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), however, a full and complete remedy was devised.

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[1] Citations to reported opinions in this case are identified hereafter simply as *Dowell*.

[2] In 1965, for example, Classen and Central High School, and Harding and Northeast High School were paired and compulsory busing was first used to increase racial balance. *Dowell*, 375 F.2d at 164.

2. *The Finger Plan.* – In 1972, the district court handed down a decision ordering the Oklahoma City School Board to implement a desegregation plan which was commonly referred to as the "Finger Plan". *Dowell*, 338 F.Supp. 1256 (W.D. Okl.), *aff'd.*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). Like many other desegregation decrees governing large urban school systems, the Finger Plan employed the techniques of pairing, clustering and massive cross-town busing to integrate the elementary schools in Oklahoma City. The neighborhood school attendance zones adopted in 1955 served as a "feeder system" under the Finger Plan, and students of age residing in those zones were bused to middle schools and high schools in such a fashion as to create racial balance.

The district court's 1972 decree implementing the Finger Plan was a full and complete remedy. It was not a "step-at-a-time" plan by definition incomplete at inception, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 435 (1976). Rather, it was a comprehensive plan which the district court found would create a "unitary system" and remain in place "until it [was] clear that disestablishment of the dual system was complete." *Dowell*, 338 F.Supp. at 1271. It thus became the law of this case that the Finger Plan established a racially neutral and constitutional method of student assignment. *See, e.g., Spangler v. Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979) (Kennedy, J., concurring).[3]

3. *The Achievement of Unitary Status.* – Several years after the school board implemented the Finger Plan, it filed a motion to close the case alleging it "[had] eliminated all *vestiges* of state-imposed racial discrimination in its school system and [was] operating a *unitary* school system." *Dowell*, 606 F.Supp. 1548, 1551 (W.D. Okl. 1985) (emphasis added). After proper notice, the district court conducted a hearing "to

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[3] The main opinion and the concurring opinion in *Spangler* are both opinions of the Court; the third member of the panel joined in both. 611 F.2d at 1242.

receive the evidence of both the plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools." Brief in Opp., App. 1a. The court "carefully reviewed this evidence and all of the reports it ha[d] received from the defendant and the Biracial Committee since the inception . . . of . . . the Finger Plan." *Id.*, at 2a.

Following the evidentiary hearing, the court entered an order on January 18, 1977, finding that the Finger Plan "was indeed a plan that worked and that substantial compliance with constitutional requirements ha[d] been achieved." *Id.* The court found that a "unitary system" had been "slowly and painfully accomplished over the sixteen years during which the cause ha[d] been pending." *Id.* "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races," the court said, "the board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of the court." *Id.* at 3a. The "Order Terminating [the] Case" dissolved the Biracial Committee and "terminated" all further "jurisdiction" in the case. *Id.* at 4a. Therefore, the district court found unitary status had been achieved only after a careful hearing and review of all aspects of the board's operations to ensure that all vestiges of prior discrimination had been eliminated.[4]

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[4] The district court in 1977 did not, as the court of appeals suggests, merely find "certain components of unitariness to have been satisfied." *See, Dowell*, 890 F.2d 1483, 1491 (10th Cir. 1989). As the district court itself observed in 1985, "[a]t the time [the] court totally relinquished its jurisdiction over [the] case in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the school district had achieved the goal of being a desegregated non-racially operated and *unitary* school system." *Dowell*, 606 F.Supp. 1548, 1554 (W.D. Okl. 1985) (emphasis added). *See also, Dowell*, 677 F.Supp. 1503, 1506 (W.D. Okl. 1987) ("This court fully intended in 1977 to restore the school board to total independence and relinquish to the board all control over the school district . . . because the Oklahoma City Schools were at that time, as they are today, operating a *unitary* system,

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More importantly, plaintiffs did *not* appeal any part of the "Order Terminating Case." The unitary finding thus became a final order.[5] Those suggesting something less than a final and complete declaration of unitary status was achieved in Oklahoma City, therefore, have simply not studied the record.

4. The K-4 Neighborhood School Plan. – During the eight years following the unitary declaration, the Oklahoma City School Board continued to implement the tenets of the Finger Plan. However, during the thirteen years the plan was implemented, demographic changes took place in Oklahoma

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wholly without discrimination to blacks or other minority students, faculty or staff.") (emphasis added).

[5] Eight years later, when respondents sought to collaterally attack the unitary finding in their challenge to the K-4 neighborhood school plan, the district court found it preclusive:

> (T)his court's finding in 1977 that a *unitary system* had been achieved by the Oklahoma City Public Schools is *res judicata* as to those who were then parties to this action . . . . There has been no showing in this case that the original plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present [respondents] are, therefore, *collaterally estopped* from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977 . . . .

Dowell, 606 F.Supp. at 1555 (emphasis added). Moreover, the court of appeals did not simply view the unitary finding as a lightly applied label without significance. Rather, the court of appeals *agreed* with the district court that the school district achieved unitariness in 1977 and that the finding was preclusive:

> When, five years later, the court determined that the implementation of the Finger Plan had resulted in *unitariness* within the district, that finding became *final*, and it, too, is *binding* upon the parties with equal force . . . . Thus, . . . the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977 . . . .

Dowell, 795 F.2d 1516, 1522 (10th Cir.) *cert. denied*, 479 U.S. 938 (1986) (emphasis added).

City which rendered inequitable that part of the plan affecting elementary students. This became apparent in 1984, when a committee study revealed the continuation of the plan at the elementary level would, *inter alia*, substantially increase the busing burden on young black children, and subject to closure a large number of schools in a predominately black area of the school district.[6]

To combat these inequities, and to increase parental and community involvement, the school board adopted for school year 1985-86 a student assignment plan which curtailed compulsory cross-town busing of elementary school children in grades 1-4, and reassigned those children to their neighborhood school. Like most other large metropolitian cities, Oklahoma City continues to have some residentially segregated areas.[7] Thus, implementation of the K-4 neighborhood school plan initially resulted in 11 of the school district's 64 elementary schools enrolling 90 percent or more black students.[8] The

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[6] Respondents conceded to the existence of these inequities. *Dowell*, 677 F.Supp. at 1514 (W.D. Okl. 1987). One of respondents' expert witnesses, Dr. Finger, acknowledged that increased busing burdens on young blacks and the potential loss of fifth-year centers resulted from the "stand-alone" school feature in the old plan. (R. vol. VIII 1202). In fact, Dr. Finger expressed surprise that the plan had not already been modified as a result of demographic change. (Id. at 1198-99). Another expert for respondents, Dr. Gordon Foster, agreed that the inequities resulting from the "stand-alone" feature of the original plan justified modification. (*Id.*, at 1266-67). Even the court of appeals was "satisified the evidence reveal[ed] that because of population shifts in the District, it was necessary to modify the Finger Plan." (*Dowell*, 890 F.2d at 1498 (10th Cir. 1989).

[7] The geographical boundaries of the Oklahoma City School District cover more than 100 square miles, spanning two counties and several municipalities in addition to Oklahoma City.

[8] One of these schools, North Highlands, was not predominately black when the Finger Plan was implemented in 1972, but ultimately became so because of demographic shifts. *Dowell*, 677 F.Supp. at 1512. Another, Parker, is located in the Star-Spencer area which was originally exempted from the Finger Plan due to its remote geographical location.

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plan contained a "majority to minority" transfer provision which allowed the parent of any elementary student assigned to a school where their race was in the majority to obtain a transfer to a school where their race would be in the minority. This transfer option was encouraged through district-provided transportation, and is still being exercised by parents in the school district.[9] The plan called for the faculty and staff at all neighborhood elementary schools to remain racially mixed. Under the plan, all fifth year centers, middle schools and high schools continued to be racially balanced with the use of compulsory busing.

One of the objectives the board sought to achieve when adopting the new plan was to increase the level of parental involvement in the schools. When the board adopted the plan it was convinced, and virtually every expert witness in this case agreed, that parental involvement was essential to student academic achievement and a quality education. (R. vol. IV 515; vol. V 736; vol. VI, 849, 891, 916; vol. VII 1066-68; vol. IX 1455). The board's belief that neighborhood elementary schools would increase parental involvement was correct. After the plan was in operation for just one year, the number of PTA organizations increased by 100 percent, and PTA memberships increased by 80 percent. Following the second year of implementation, the number of PTA organizations had increased a total of 200 percent, and PTA membership had

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Two more of these schools, Lincoln and Truman, were closed subsequent to the adoption of the neighborhood plan. Thus, only seven of the schools which were predominately black before the Finger Plan was implemented remain predominately black today.

[9] The "majority to minority" transfer option has long been recognized as an aid to desegregation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971); *Dowell*, 375 F.2d 158 (10th Cir. 1967). During school year 1985-86 a total of 332 parents exercised the option, and the following year a total of 181 exercised it. (Def. Ex. 108, R. vol. II 31, 34).

increased by a total of 144 percent.[10] (Def. Ex. 139, R. vol. IV 582; vol. V 625; Def. Ex. 140, R. vol. IV 578; vol. V 742).

5. Dowell I. – Respondents filed a motion to reopen the case challenging the unitary status of the school district and the constitutional validity of the new plan. They claimed the neighborhood school plan resegregated the school district because it resulted in the creation of the predominately black neighborhood schools.

Following an evidentiary hearing, the district court found: (1) its unitary finding in 1977 was binding, (2) that the school district remained unitary in 1985, and (3) that the neighborhood school plan was constitutional since it was not adopted with the intent to discriminate on the basis of race. *Dowell*, 606 F.Supp. 1548 (W.D. Okl. 1985). Thus, the court concluded that special circumstances did not exist which warranted reopening the case.

6. Dowell II. – The court of appeals agreed that the 1977 finding of "unitariness within the district, . . . became final, and . . . [was] binding upon the parties." *Dowell*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). However, even though the Oklahoma City School District had achieved unitary status, the court of appeals

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[10] Also, Open House attendance was up 5,167, and 3,745 more parents attended parent/teacher conferences, in 1986-87 than in the year preceding the plan, (Def. Ex. 140; R. vol. IV 578, vol. V 742; Def. Ex. 144-146; R. vol. II 31, 34).

Expert testimony presented at the hearing directly related increases in parental and community involvement to the adoption of the neighborhood plan. (R. vol. III 349-50; vol. IV 428-29, 518-20, 584-85; vol. V 630, 736-37, 775; vol. VI 853-54, 868, 897, 919).

The increased level of parental involvement which came with neighborhood schools coupled with the board's "Effective Schools" curriculum resulted in overall academic gains at eight of the predominately black elementary schools which exceeded the average gains made by black children nationally. (Def. Ex. 185, R. vol. II, 34, 35; R. vol. VI 933-34). Further, between 1985-86 and 1986-87 the gap between third grade black and white student achievement test scores was reduced by 13 percent. (Def. Ex. 185 at 4, R. vol. II 34, 35).

concluded the school board continued to be governed in 1985 by the terms of the original desegregation order entered thirteen years earlier: "[W]ithout specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of segregation." *Id.*, at 1520. Thus, the court concluded the district court erred in searching the record for discriminatory intent, and reversed with instructions that the school board had the burden to prove that "changed conditions require[d] modification or that the facts or law no longer require[d] the enforcement of the order." *Id.*, at 1523.

7. Dowell III. – On remand in 1987, the district court recognized that the "fundamental issue" it had to address, in light of the Tenth Circuit's remand instructions, was "whether the school board had shown a substantial change in conditions warranting dissolution or modification of the 1972 order." *Dowell*, 677 F.Supp. 1503, 1506 (W.D. Okl. 1987). Since the existence of residential segregation in some Oklahoma City neighborhoods resulted in the predominately black elementary schools respondents were challenging, the district court correctly saw the necessity of determining the causes of present residential segregation in Oklahoma City. After a thorough analysis of pertinent demographic data, relocation statistics and expert testimony, the court found the residential segregation presently existing in Oklahoma City was too "attenuated" to be linked to the unlawful segregation of the past.[11] *Id.* at 1506-1513. Specifically, the court found the

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[11] Without question, the evidence demonstrated that residential segregation no longer had the effect of locking certain black students into racially identifiable schools. In 1960 the historical concentration of black households in the east inner-city area was evident, (Def. Ex. 2, R. vol. II 31, 34). However, by 1980 there had been a substantial migration of blacks from the east inner-city to the northern, western and southern parts of the school district, (Def. Ex. 4, R. vol. II 31, 34). Two relocation studies which were admitted into evidence actually tracked the movement

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current causes of residential segregation in Oklahoma City were: (1) economics and housing affordability, (2) personal preferences and social relationships, (3) urban structure, and (4) to a limited extent, private discrimination.[12] *Id.* at 1511-1512.

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of specific black families from the east inner-city area to previously all white sections of the school district, (Def. Ex. 7, R. vol. II 34; Def. Ex. 8, R. vol. II 77, 92).

While it is true that between 1960 and 1980 the east inner-city area remained predominately black, the evidence demonstrated there was quite a substantial decrease in the number of blacks choosing to live in this area. In 1960, for example, 84 percent of all blacks residing in the entire Oklahoma City metropolitan area lived in the east inner-city tracts. By 1980, however, only 16.8 percent of the entire black population in the metropolitan area lived in these tracts. (Def. Ex. 5D, R. vol. II 31, 34).

The evidence showed that the mobility of blacks in Oklahoma City resulted from the removal of the unlawful racial barriers of the past, (R. vol. II 52-53, 88). Indeed, black witnesses testified without contradiction that today black people in Oklahoma City voluntarily choose where they wish to reside without governmental restriction, (R. vol. III 313; vol. V 678). Today, black students reside in every neighborhood attendance area in the Oklahoma City school district, (Def. Ex. 11, R. vol. II 136, vol. III 295; Def. Ex. 12 and 13, R. vol. II, 34). By way of contrast, in 1972 virtually no black students (fewer than 1 percent) resided in 39 of these neighborhood attendance areas. *Id.* In sum, between 1972 and 1986, the population residing within the Oklahoma City school district decentralized in such a fashion that the exposure of blacks to non-blacks almost *doubled*, (Def. Ex. 40, R. vol. II 174, vol. III 295; R. vol. II 173). And, projections revealed that by 1995 no attendance area in the school district should have less than 16.2 percent blacks residing in it, (Def. Ex. 14, R. vol. II 143, vol. III 295).

[12] The evidence showed that 30 to 70 percent of racial separation in America today is attributable to economic status, (Def. Ex. 10 at 1, R. vol. II 91, 92). In this connection, black households prefer neighborhoods which are 50 percent black and 50 percent white, while whites prefer neighborhoods ranging from 0 percent to 30 percent black. *Id.* Once a neighborhood becomes 25 to 30 percent black, white households start

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The court then examined the evidence to determine whether the school district had maintained its unitary status from 1977 to date. After a review of pertinent factual information, the court analyzed the controlling decisions of this Court and concluded once again that the school district remained unitary. *Id.*, at 1517-1519. Recognizing the differentiating factor between *de jure* segregation and *de facto* segregation was the "purpose or intent to segregate,"[13] the court found that the K-4 neighborhood school plan did not undermine the unitary status of the school district because it was not adopted with the intent to discriminate on the basis of race. *Id.* at 1517-1518. Rather, the court found that the neighborhood school plan was adopted for the following nondiscriminatory reasons: (1) to avoid increased busing burdens on young black people, (2) to avoid the closure of fifth-year centers in the northeast quadrant, and (3) to increase parental and community involvement.[14] *Id.* at 1513-1514, 1516-1517.

Having the benefit of the facts related to the foregoing issues, the district court then addressed the issue of whether the 1972 decree should be dissolved. In the process of dissolving the decree, the district court relied upon the teaching of *Swann* that: it was the dismantling of the "dual school system" which was the target of the case, and the remedy was designed to operate only during the "interim period" when remedial adjustments were being made to eliminate the dual

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leaving the neighborhood due to personal preference. However, the neighborhood changes as much because the white households prefer not to move into these areas, (R. vol. II 87-88). This evidence led the district court to conclude the exodus of a large number of blacks and the lack of white movement into the area left the east inner-city tracts much less populated, but still predominately black. *Dowell*, 677 F.Supp. at 1512.

[13] *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973).

[14] Again, we emphasize, respondents conceded the stand-alone school feature of the Finger Plan had been impacted by demographic change in such fashion as to increase busing burdens on young black and to subject fifth-year centers to possible closure. See, note 6, *supra*.

system.[15] *Id.* at 1520-1521. The court concluded the facts no longer required enforcement of the 1972 decree because the purposes of the litigation had been fully achieved. Specifically, the court found that the "substantial change in conditions" which over time resulted in the elimination of illegal discrimination, and the achievement of unitary status, was precisely the change which compelled dissolving the 1972 decree *Id.*, at 1520-1522. Respondents appealed.

8. Dowell IV. – The Tenth Circuit, in a 2-1 decision, reversed and remanded. The majority "approach[ed] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." *Dowell*, 890 F.2d 1483, 1486 (10th Cir. 1989). The majority took "the simple position that an injunctive order entered in a school desegregation case has the same attributes as any other injunctive order issued by a federal court." *Id.* at 1491. It concluded, therefore, that the standard articulated in *United States v. Swift and Co.*, 286 U.S. 106, 119 (1932) ("[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions"), governed the dissolution of the desegregation decree. *Id.* at 1490.

The majority of the panel believed the declaration of unitariness did not fit into the formula because the "injunction t[ook] on a life of its own and bec[ame] an edict quite independent of the law it [wa]s meant to effectuate," *Dowell*, 890 F.2d at 1490 (omitting citations). Indeed, the Tenth Circuit was of the view that the district court's "jurisdiction extend[ed] beyond the termination of wrongdoing." *Id.* Thus, "[t]he condition that eventuate[d] as a function of the injunction [unitariness] [could] not alone become the basis for altering the decree absent the *Swift* showing." *Id.* To reach this conclusion, the court reiterated and perpetuated a long standing conflict between the circuits:

> Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances

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[15] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22, 24 (1971).

> which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra, United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.) *cert. denied*, 419 U.S. 938 (1986).

Id. at 1492.

Notwithstanding the unitary declaration, the panel majority found the board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects." *Id.* at 1504 (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 538). The majority, therefore, did not focus on whether the plan was "non-discriminatory".[16] 890 F.2d at 1504. Finding the board did not meet its burden under *Swift* to dissolve the decree, the court remanded the case with instructions, *inter alia*, to take evidence on alternatives to "maintain racially balanced elementary schools." *Id.* at 1506.

In a forceful yet eloquent dissent, Judge Baldock summed up the flaws with the majority's reasoning:

> This court's opinion is faulty for three reasons: (1) improper reliance upon principles concerning the modification and termination of injunctions which are inapposite in the school desegregation context, (2) inadequate recognition of the legal effect of the school district's unitary status, and (3) insufficient deference to the factual findings of the district court concerning segregative intent.

Dowell, 890 F.2d at 1507 (10th Cir. 1989) (Baldock, J., dissenting).

The dissenting panel member concluded that the majority ruling "denie[d] the essence of unitariness" and appeared to

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[16] Even though the court concluded that discriminatory intent was not the pertinent inquiry, it nonetheless ruled that the district court entered clearly erroneous findings on the question of intent in the absence of an argument from respondents to that effect. The court rejected the plan because it "restore[d] the effects of past discriminatory intent remedied by the decree by recreating racially identifiable elementary schools, overlooking school capacity problems, and failing to address faculty imbalance." 890 F.2d at 1504.

"impose greater substantive burdens on a school board than before the unitary finding." *Id.* at 1520. Recognizing that the school district "proved non-segregative purpose to the district court," the dissent was of the view that the school district should not be monitored in perpetuity. *Id.* at 1540. The dissent would have "lifted" the original desegregation decree and returned the schools to "local control." *Id.*

SUMMARY OF ARGUMENT

The achievement of unitary status means that illegal discrimination and its vestiges have been eliminated, and that the constitutional violation has been cured. Continuation of the remedial injunction subsequent to the achievement of unitary status is thus inconsistent with the meaning of unitariness, and at odds with the purpose and scope of the desegregation remedy. Dissolution of the remedial injunction is warranted, therefore, once unitary status is attained. The continuance of the injunction in a unitary school system for the purpose of maintaining racial balance in the midst of residential segregation which cannot be eliminated, is to unconstitutionally require that the injunction and busing be maintained in perpetuity.

Application of the *Swift* standard to the dissolution of a remedial desegregation injunction is inappropriate unless unitariness is afforded its true meaning. The attainment of unitary status demonstrates the purposes of the litigation as incorporated in the decree have been fully achieved, and that a substantial change in conditions has occurred which justifies dissolving the remedial injunction.

After a declaration of unitariness, since all vestiges of the violation have by definition been eradicated, a school board may adopt a neighborhood assignment plan even if it has a disproportionate racial impact, provided that the board's action is not intentionally discriminatory and, therefore, is not a new constitutional violation. Since the burden allocation in a school desegregation case is based on policy and fairness, parties challenging post-unitary school board action which has a disproportionate racial impact should shoulder the burden of proving the board acted with discriminatory intent before federal court jurisdiction may again be invoked.

There is substantial evidence in the record to support the district court's factual findings that (1) the Oklahoma City School Board's neighborhood school plan was adopted without discriminatory intent, (2) that the school district remained unitary in 1987, and (3) that the relationship between past segregative acts and present residential segregation have become so "attenuated" as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention. The court of appeals failed to consider the record in its entirety, afforded insufficient deference to the district court's factual findings, and thus incorrectly concluded those findings were "clearly erroneous."

ARGUMENT

I. WHEN UNITARY STATUS IS ACHIEVED: (1) THE REMEDIAL DECREE SHOULD BE LIFTED, AND (2) SCHOOL AUTHORITIES SHOULD BE FREE FROM ALL FURTHER JUDICIAL CONTROL IN THE ABSENCE OF A SHOWING THAT THEY SUBSEQUENTLY ACTED WITH INTENT TO DISCRIMINATE

The call of the Tenth Circuit for a unitary school district to remain under the governance of a remedial decree for the purpose of maintaining racial balance in the absence of a new constitutional violation is based on sociological theory, not constitutional doctrine. Although the Court has yet to specifically define the effects of unitariness, it has slowly and methodically adopted governing principles in the context of school desegregation which provide the answers. We now turn our attention to an examination of those principles, and note that *Dowell's* approach disregards virtually each of them.

A. Unitariness Means The Constitutional Violation Has Been Corrected.

In order to define the effects of unitariness, it is first necessary to review its meaning. The genesis of unitariness is

linked to *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), which struck down state-imposed segregation in public schools as contrary to the equal protection guarantees of the Constitution. The maintenance of separate schools for black and white children was the constitutional violation which was required to be corrected by remedial measures. *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*). School authorities had no prior experience to prepare them for dealing with the changes and adjustments of the magnitude and complexity called for in *Brown II*. As a result, very little progress was made with the dismantlement of dual school systems which had long been maintained by state law.

Thus, in *Green v. County School Board*, 391 U.S. 430, 437-438 (1968), school authorities were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a *unitary* system in which racial discrimination would be eliminated root and branch," (emphasis added). This charge placed the burden on school authorities "to come forward with a plan which promise[d] realistically to work '*now*' . . . until it [wa]s clear that state-imposed segregation ha[d] been completely removed," *Id.*, at 439. When school authorities failed in their affirmative obligations, district courts were given "broad power to fashion a remedy that [would] assure a *unitary* school system." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) (emphasis added). The achievement of unitary status, therefore, is the ultimate "goal" to be achieved in school desegregation litigation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-59 1979); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200-01 n. 11 (1973).

To assist school districts in achieving this goal, the Court handed down a number of decisions defining what steps were necessary to achieve unitary status. First, the Court determined that the mere implementation of a plan did not create a unitary system. While a final order adopting a desegregation plan "established a racially neutral system of student assignment," *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976), the unitariness determination had to consider

whether the plan was fully implemented in "good faith." *Brown II*, 349 U.S. at 299; *Green*, 391 U.S. at 439; *Swann*, 402 U.S. at 12.[17]

Second, the Court ruled that existing policies and practices with regard to "composition of student bodies," "faculty, staff, transportation, extra-curricular activities and facilities" had to be non-discriminatory before unitary status could be achieved. *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 18. Focusing solely on student assignment was improper. "[M]atters aside from student assignments [had to] be considered" before the unitariness determination could be made. *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 460 (1979). Additionally, "community and administration attitudes" towards the school system were a part of the formula. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 196 (1973).

Third, in *Spangler*, the Court reiterated that "the unitary system contemplated by . . . *Swann*" was achieved when "the affirmative duty to desegregate ha[d] been accomplished and racial discrimination through official action [wa]s eliminated from the system." *Spangler*, 427 U.S. 424, 436 (1976) (quoting *Swann*, 402 U.S. at 31-32). In this context, the elimination of racial discrimination meant that "all vestiges of state-imposed segregation" were to be eliminated, *Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (*Milliken II*), to the "greatest possible degree . . . taking into account the practicalities

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[17] Accordingly, the First Circuit has observed that a history of "good faith" operation of the school system, in general, and implementation of assignment orders, in particular, support a finding of unitariness. *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987). Similarly, the Eleventh Circuit has ruled "[a] declaration of unitary status is . . . inappropriate when the evidence shows that school authorities have not consistently acted in good faith to implement the objectives of the plan." *Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd.*, 883 F.2d 945, 952 (11th Cir. 1989). *But see, Dowell*, 890 F.2d 1483, 1499 n. 41 (10 Cir. 1989) (rejecting the government's "contention that sustained compliance with a desegregation plan is entitled to great weight and should create at least a presumption of unitary status").

of the situation." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971); *Accord Swann*, 402 U.S. at 26.

Finally, the Court emphasized that the unitariness determination had to be made in light of local conditions. Since circumstances and demographics varied, "there [wa]s obviously no one plan that [would] do the job in every case." *Milliken II*, 433 U.S. at 287; *Green*, 391 U.S. at 439; *Keyes*, 413 U.S at 196. Consistent with this rationale, the Fifth Circuit has held that "[t]he decision that public school officials have satisfied their responsibility to eradicate segregation and its vestiges must be based on conditions in the district, the accomplishments to date, and the feasibility of further measures." *Ross v. Houston Independent School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983).[18]

Since unitariness signifies the elimination of unlawful discrimination and its effects from a school system, it by definition means that the previous constitutional violation has been corrected. The final declaration of unitary status achieved by the Oklahoma City School Board in 1977 carries this same meaning, because the attainment of that goal was only made possible by the district court's enforcement of, and the board's compliance with, the foregoing constitutional principles. Since unitariness means the effects of past discrimination have been eliminated, *Dowell's* directive for the Oklahoma City School Board to remain under the governance of the injunction in the absence of a showing of segregative purpose, because its neighborhood school plan "restore[d] the effects of past discriminatory intent," 890 F.2d at 1504, is at

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[18] A finding of unitariness, therefore, is properly characterized as a finding of fact subject to the "clearly erroneous" rule. *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521, 533 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 420 (1986).

The principles of collateral estoppel and issue preclusion also apply to a final declaration of unitary status. *Riddick*, 784 F.2d at 531 (citing *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980), [and] *Montana v. United States*, 440 U.S. 147, 153-54 (1979)); *Dowell*, 795 F.2d 1516, 1522 (10th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986).

odds with the very meaning this Court has given to the achievement of unitary status.

B. In The Absence Of A Constitutional Violation There Is No Basis For Continuing The Remedial Decree.

Dowell's mandate for the continuation of the injunction subsequent to the achievement of unitary status for the purpose of maintaining racial balance is also contrary to constitutional principles which govern the nature and scope of a desegregation remedy.

1. Nature of the Remedy. – Rather than concentrating on mere numbers in a school, the consistent emphasis of this Court has been on the elimination of discriminatory *systems*. Speaking for a unanimous court in *Swann*, Chief Justice Burger stressed this premise:

> The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle *dual school systems*.
>
> We are concerned in these cases with the elimination of discrimination inherent in the *dual school systems*, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds.

Swann, 402 U.S. at 22-23 (emphasis added). *Swann's* mandate to target the system rather than the composition of the classroom has never been abandoned.[19]

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[19] *See, e.g., Milliken v. Bradley*, 418 U.S. 717, 737 (1974) (*Milliken I*) ("The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems"); *Columbus v. Penick*, 443 U.S. at 458 ("Brown II was a call for the dismantling of well-entrenched dual systems."); *Richmond v. Croson Co.*, 102 L.Ed.2d 854, 902 (1989) (Scalia, J., concurring) ("We have stressed each school district's constitutional 'duty to *dismantle* its dual system'.")

Additionally, the Court has emphasized that the purpose of the remedy is *not* to maintain racial balance. *Swann* stressed that the Constitution did not require "any particular degree of racial balance or mixing." *Swann*, 402 U.S. at 24.[20] The Court repeatedly held that the use of mathematical ratios to maintain racial balance was sanctioned as "no more than a starting point in the process of shaping a remedy" during the transitory period when the dual school system was being disestablished. *Swann*, 402 U.S. at 25; *Spangler*, 427 U.S. at 434. And, it was clear that even during this transitory period that "the existence of some small number of one-race or virtually one-race schools within a district [did] not in and of itself . . . mark . . . a system that still practice[d] segregation by law." *Swann*, 402 U.S. at 26.

Therefore, "the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." *Milliken II*, 433 U.S. at 280-281 n. 14. Indeed, in the remedial phase of the case when the dual school system was being dismantled, the existence of racial imbalance "simply . . . shift[ed] the burden of proof" to school authorities, it did not "equat[e] with a constitutional violation calling for a remedy." *Milliken I*, 418 U.S. at 741 n. 19.

In Oklahoma City, the binding declaration of unitary status entered in 1977 signified that the dual school system had been dismantled, and that the objective of the remedy had been achieved. The Tenth Circuit's attempt to subsequently continue the decree for the purpose of maintaining racial balance is thus inconsistent with the nature of the remedy. Moreover, since empirical evidence demonstrates that residential segregation cannot be eliminated, (R. vol. II 115-116),

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[20] *See also, Milliken I*, 418 U.S. at 740-41 ("The clear import . . . from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in any 'school, grade or classroom'."); *Accord, Spangler*, 427 U.S. at 434 ("The district court's interpretation of the order appears to contemplate the 'substantial constitutional right [to a] particular degree of racial balance or mixing' which the Court in *Swann* expressly disapproved.")

Dowell's mandate for continued integration becomes a permanent end-state requirement.[21]

We also submit that *Dowell's* directive is contradictory to the restorative nature of the remedy which "[wa]s to correct . . . the condition that offend[ed] the Constitution," *Swann*, 402 U.S. at 16,[22] and "to make whole the victims of unlawful conduct." *Milliken II*, 433 U.S. at 280-281 n. 15. Once unitary status is achieved, the victims of unlawful conduct have been restored and made "whole." Thus, rather than serving "to make whole the victims of unlawful conduct," *Dowell's* perpetuation of the remedy constitutes *retribution* to young school children who have never been the victims of unlawful discrimination. Such an exercise of judicial power finds no basis in the Constitution.

2. *Scope of the Remedy.* – Judicial powers in a school desegregation case have never been plenary. There were clearly defined " 'limits' beyond which a court [could] not go in seeking to dismantle a dual school system . . . [and] [t]hese limits [were] in part tied to the necessity of establishing that school authorities ha[d] in some manner caused unconstitutional segregation." *Spangler*, 427 U.S. at 434. Since "judicial powers [could] be exercised only on the basis of a constitutional violation," *Swann*, 402 U.S. at 16, federal court desegregation injunctions "exceed[ed] appropriate limits if they [were] aimed at eliminating a condition that d[id] not violate

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[21] One commentator observes that such a requirement undercuts important ethnic values. *See* Gewirtz, *Choice in Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L.Rev. 728, 737 (1986) ("[T]he view that the Constitution permanently mandates integration without regard to the causes of nonintegration fails to take adequate account of values of ethnic group identity and pluralism that might be furthered in a nonintegrated setting. It disregards the fact that blacks themselves, like most other ethnic groups in the United States, might come to prefer nonintegrated settings, believing that the important interests are served by institutions in which they are not an 'integrated' racial minority.")

[22] *Accord, Milliken I*, 418 U.S. at 738; *Firefighters v. Stotts*, 467 U.S. 561, 587-588 (1984) (O'Connor, J., concurring).

the Constitution or d[id] not flow from such a violation." *Milliken II*, 433 U.S. at 282.[23]

The notion that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate," and thus "extends beyond the termination of wrongdoing," *Dowell*, 890 F.2d at 1490, simply ignores the limitations the Court heretofore placed on the scope of the remedy. Unitariness marks the elimination of the constitutional violation, and "[a]bsent a constitutional violation there [is] no basis for judicially ordering [the] assignment of students on a racial basis." *Swann*, 402 U.S. at 28; *Accord, Spangler*, 427 U.S. at 434.[24]

There is a good reason why judicial powers in a school desegregation case are not plenary. Public education in America "is perhaps the most important function of state and local governments," *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (*Dayton I*). In *Milliken I*, the court recognized that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." 418 U.S. at 741-742. "It is for this reason that the case for displacement of the local authorities by a federal court in a desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton I*, 433 U.S. at 410.[25]

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[23] Therefore, "the nature of the violation determines the scope of the remedy," *Swann*, 402 U.S. at 16, and the remedy must be "commensurate with the violation." *Columbus v. Penick*, 443 U.S. at 465.

[24] The principle that there cannot be a remedy without a wrong is not unique to school desegregation cases. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (affirmative action) ("[T]he [Supreme] Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.")

[25] *See also, Spallone v. United States*, 107 L.Ed.2d 644, 655 (1990) ("The federal courts in devising a remedy must take into account the interest of state and local authorities in managing their own affairs, consistent with the Constitution.")

When a federal court enjoins the conduct of school officials, it acts in an administrative rather than a judicial capacity, thus intruding into areas not normally within its domain. Injunctive decrees in desegregation cases are therefore "frequently attacked as exceeding a court's remedial powers, on the ground that they interfere with a defendant's discretion to take steps that would not themselves violate the Constitution." Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585, 597 (1983). For these reasons, local school authorities must have the right to regain control of the school system once the injunction has achieved its remedial purpose.

3. Busing. – The compulsory busing of young students across town for the purpose of maintaining racial balance displaces the values of local automony more so than any other aspect of the remedy. Unfortunately, the permissible scope of busing as an implement to a remedial decree cannot be precisely defined due to the "infinite variety of problems presented in thousands of situations." *Swann*, 402 U.S. at 29. For this reason, busing of students to maintain racial balance has become the subject of great controversy.

Subsequent to *Swann's* authorization of busing as a limited desegregation tool, time and experience brought its effectiveness into question. Justice Powell, in his eloquent dissent in *Keyes*, 413 U.S. at 253, pointed out that "the single most disruptive element in education . . . [wa]s the wide spread use of compulsory busing, especially at elementary grade levels." Six years later, Chief Justice Burger recognized that "it [wa]s becoming increasingly doubtful that massive public transportation really accomplishe[d] the desirable objective sought." *Columbus v. Penick*, 443 U.S. at 469 (Burger, C. J., concurring.)

The Tenth Circuit's directive to racially balance the elementary schools in Oklahoma City "most certainly will require busing." *Dowell*, 890 F.2d 1483, 1506 (10th Cir. 1989) (Baldock, J., dissenting). Since busing is part of the remedy, its scope is necessarily limited to that of the remedy. Therefore, "large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school

authorities fulfilled their constitutional obligations in the past." *Austin Indep. School Dist. v. United States*, 429 U.S. 990, 995 (1976) (Powell, J., joined by Burger, C. J., and Rehnquist, J., concurring). When school authorities achieve unitary status, they have fulfilled their constitutional obligations of the past, and a federal court's use of busing to maintain racial balance is simply no longer justified under the Constitution.[26]

Moreover, a unanimous Court in *Swann* held busing was not warranted "when the time or distance of travel [wa]s so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. *Swann* went on to point out that the "limits on time of travel w[ould] vary with many factors, but probably with none more than the age of the students." *Id.* It is notable that demographic changes in Oklahoma City ultimately rendered the stand-alone school feature of the Finger Plan inequitable by increasing busing burdens on young black children. Indeed, the record here demonstrates that increased busing burdens on young blacks was a primary factor in the Oklahoma City School Board's decision to return to neighborhood schools in grades 1-4. This leads to the inescapable conclusion that neighborhood schools at the elementary level are appropriate in Oklahoma City irrespective of whether the Court decides the board should remain under the governance

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[26] This does not mean, however, that the Oklahoma City School Board lacks the authority, by virtue of the achievement of unitary status, to continue the busing of students in grades 5-12. In *Swann*, the court recognized "[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 16. *Swann* went on to explain that "[t]o do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Id.*

of the remedial injunction. *See also*, Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L.Rev. 789, 833 (1988) ("[C]hanged circumstances may cause the busing plan to endanger health or education, although it did not do so when implemented. If so, those considerations will likely support the [neighborhood] plan.")

C. Once Unitary Status Is Achieved, The Injunctive Decree Should Be Lifted.

Desegregation injunctions are not designed to operate indefinitely. The remedial aspect of the decree by necessity places a temporal limitation on its usage. In *Brown II*, for example, the Court indicated the injunction would operate during a "period of transition" to effectuate a racially nondiscriminatory school system. 394 U.S. at 299. Over a decade later, *Green* reiterated that this "*transition* to a unitary, nonracial system of public education was . . . the ultimate end to be brought about," 391 U.S. at 436 (emphasis added), and concluded that a district court should "retain jurisdiction *until* it [was] clear that state-imposed segregation [had] been completely removed." *Id.*, at 439 (emphasis added).[27] *Swann* reemphasized the mandate of *Brown I* "to eliminate dual systems and establish unitary systems *at once*," 402 U.S. at 6 (emphasis added), and reaffirmed the teaching of *Green* that the remedy was intended to operate only during "*the interim period* when remedial adjustments [were] being made to eliminate the dual school system." 402 U.S. at 28 (emphasis added). Correct application of the remedy pursuant to the teaching of *Swann*, therefore, "proceeds from recognition that

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[27] In *Raney v. Board of Education*, 391 U.S. 443, 449 (1968), the Court again recognized "the better course would be to retain jurisdiction *until* it [wa]s clear that disestablishment ha[d] been achieved" (emphasis added). The court in Raney articulated two reasons why the district court was to retain jurisdiction during this transitory period: (1) to ensure "that a constitutionally acceptable plan [wa]s adopted, and (2) that it [wa]s operated in a constitutionally permissible fashion so that the goal of a desegregated non-racially operated school system [wa]s rapidly and finally achieved." *Id.*

'the requirement of integration is a transitional rule, justified . . . under a corrective theory rather than a distributive or a prohibitory theory'." Landsberg, *supra*, at 807 (quoting Gewirtz, *Choice in the Transition*, *supra*, at 752).

Recognizing the temporary nature of the remedy, the Court in *Swann* ruled that the achievement of unitary status released school authorities from federal supervision:

> "At some point, these school authorities and others like them should have achieved full compliance with this court's decision in *Brown I*. The systems would then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by district courts should not be necessary."

Swann, 402 U.S. at 31-32.

While the Court in *Swann* clearly held that one effect of unitariness is the relinquishment of federal supervision, it was not until five years later in *Spangler* that the Court first addressed the effects of unitariness on a remedial decree. Starting in 1970, the Pasadena school system operated under a desegregation decree designed to eliminate schools with "a majority of any minority students." *Spangler*, 427 U.S. at 431. In 1974, the school board sought modification of the reassignment order because population shifts had undermined the effectiveness of the plan. The district court denied the request

and continued the annual reassignment of students, despite the absence of proof of deliberate school board efforts to undermine the decree. This Court reversed, holding that the district court abused its discretion by requiring annual reassignment of students absent proof that school authorities had deliberately caused changes in the racial mix. The Court emphasized that the desegregation plan ordered by the district court was "designed" to achieve a unitary school system, *Id.*, at 436, and thus concluded:

> "[H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the district court had fully performed its function of providing the appropriate remedy for previously racially discriminatory attendance patterns."

Spangler, 427 U.S. at 436-437.

The teaching of *Spangler*, therefore, is that once unitary status is achieved in the area of student assignment, school authorities are entitled to be relieved of the obligations imposed by the reassignment remedy. Although the dissent in *Spangler* did not agree that unitariness could be achieved in incremental fashion, it was of the view that *Swift* authorized alteration of the decree when unitariness had been achieved in all aspects of the school system:

> I see no reason to require the district court in a case such as this to modify its order prior to the time that it is clear that the entire violation has been remedied and a unitary system has been achieved. We should not compel the district court to modify its order unless conditions have changed so much that "dangers, once substantial, have been attenuated to a shadow." *United States v. Swift and Co.*, 286 U.S. 106, 119, 76 L.Ed. 999, 52 S.Ct. 460 (1932).

Spangler, 427 U.S. at 444 (Marshall, J., joined by Brennan, J., dissenting).

The inescapable conclusion to be drawn from *Swann* and *Spangler*, therefore, is that once a school system achieves a final declaration of unitary status as the Oklahoma City

School Board did in 1977, then it is entitled to have the entire desegregation decree lifted. Indeed, in *Wright v. Council of City of Emporia*, 407 U.S. 451, 470 (1972) the Court recognized that a desegregation "injunction does not have the effect of locking [a school district] into its present circumstances for all time," and that "[o]nce the unitary system has been established and accepted," it was appropriate to lift the injunction. *See also, Id.*, at 479 (Burger, C. J., joined by Rehnquist, J., dissenting) ("Judicial power ends when a dual school system has ceased to exist"); [and] *Richmond v. Croson Co.*, 102 L.Ed.2d 854, 902 (1989) (Scalia, J., concurring) ("[A]fter the dual school system has been completely disestablished, the state may no longer assign students by race").[28]

Consistent with the foregoing decisions, a number of lower courts addressing the termination issue have concluded that when unitary status is achieved the court ordered remedy has accomplished its purpose and should be lifted. When the Court remanded *Spangler*, for example, the Pasadena City Board of Education contended the district court should dissolve the injunction. Although the district court found the school board had substantially complied with the desegregation decree for several years, it refused to dissolve the injunction because there was evidence the Pasadena School Board "intended to return to the neighborhood school pattern existing before 1970, a configuration that would [have made] . . . racial percentages in the schools resemble the pre-1970 percentages." *Spangler v. Pasadena City Board of Education*,

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[28] The court has also addressed the termination issue in contexts other than school desegregation. *See, e.g., United Steel Workers v. Weber*, 443 U.S. 193, 208-09 (1979) (observing that one feature establishing the permissibility of an affirmative action plan was that it was "a temporary measure" and would "end as soon as the percentage of black craftworkers approximate[d] the percentage of blacks in the local labor force"); [and] *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring) (observing that minority set-aside legislation "[wa]s not a permanent part of federal contracting requirements" since it contained an explicit termination provision.).

611 F.2d 1239, 1243 (9th Cir. 1979) (Kennedy, C. J., concurring).

On the school board's appeal, the Ninth Circuit reversed. It directed the district court to enter a order relinquishing all further jurisdiction and to return full control to the school board:

> From the standpoint of racial balance and pupil assignments, compliance with the Pasadena plan for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies. Further delay in returning full responsibility for administration to the school board is unjustified.

Spangler, 611 F.2d at 1244 (Kennedy, J., concurring). The Ninth Circuit thus recognized that "[t]he displacement of local government by a federal court [wa]s presumed to be temporary," *Id.* at 1241, and concluded that when the unconstitutional practice was eliminated, the "court-ordered remedy ha[d] accomplished its purpose." *Id.*, at 1242 (Kennedy, J., concurring).

Similarly, the First Circuit has concluded that if "schools have reached unitariness in student assignments," the "injunctive orders addressing the student assignment process" should be dissolved. *Morgan v. Nucci*, 831 F.2d 313, 326 (1st Cir. 1987). The First Circuit therefore is of the view that a school district's attainment of unitary status:

> represents the "accomplishment" of desegregation, and is the ultimate goal to which a desegregation court tailors its remedies once a finding of intentional discrimination is made. . . . [T]he one thing certain about unitariness is its consequences: the *mandatory* devolution of power to local authorities.

Morgan, 831 F.2d at 318 (emphasis added).

In a case which is factually indistinguishable from *Dowell*, the Fourth Circuit also concluded that unitariness brings an end to all judicial control over the schools. *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521 (4th Cir.) *cert. denied*, 419 U.S. 938 (1986). The Norfolk school system in 1975 was found unitary in an order like that in Oklahoma City

which terminated jurisdiction without dissolving the desegregation decree. Several years later the Norfolk board adopted a neighborhood elementary school plan which curtailed compulsory busing of students in grades 1-6. Because of residential segregation, a number of Norfolk's neighborhood schools were racially identifiable. The Norfolk plan was unsuccessfully challenged in district court, and the principal issue on appeal was the effect of the unitary finding upon the challenge to the new plan. *Id.*, at 534. Recognizing the pronouncement in *Swann* that unitary status signified the complete elimination of unlawful segregation, the Fourth Circuit ruled "once the goal of unitary status [wa]s achieved, the district court's role end[ed]" *Id.*, at 535, and held that the order finding Norfolk unitary "returned control of the city's schools to the school board." *Id.*, at 538.

Likewise, the Fifth Circuit has ruled that a unitary finding coupled with dismissal of the case ends the school board's obligation under the decree. *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987). In fact, the Fifth Circuit went so far as to hold that the attainment of unitary status coupled with the termination of jurisdiction meant the injunction was "absent." *Id.*, at 1175.

The only Circuit which has specifically ruled that a finding of unitariness does *not* warrant lifting the injunction is the Tenth Circuit:

> Nor, in our view does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521; *Contra, United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 419 U.S. 938 (1986).

Dowell, 890 F.2d 1483, 1492 (10th Cir. 1989). The Tenth Circuit's error is not surprising, because it "approach[ed] this case not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." *Id.* at 1486.

Aside from the constitutional principles we reviewed earlier, there are other important reasons which support the dissolution of the decree upon the achievement of unitary status. First, the original school board members who perpetuated segregation are most likely no longer in power. New board members who have dealt with the desegregation process are more attuned to their constitutional obligations and less likely to resurrect illegal segregation. Second, when a desegregation remedy has been implemented in good faith for a number of years, public perceptions about the racial character of schools have been transformed. In Oklahoma City, for example, an entire generation of children were educated for thirteen years under the governance of the Finger Plan at the elementary level.

Political conflict over the termination question also creates the danger that a temporary rule may become permanent. In other words, during the period of transition public attitudes grow accustomed to temporary measures which the law no longer requires. Next, there is a paternalistic aspect to compulsory desegregation because a judicial authority is sometimes concluding that an individual is not the best judge of what he really wants or what is in his own best interest. In America, choice cannot be dictated indefinitely. Finally, our racial history will always be with us. If the duty to eliminate the effects of past discrimination is carried past its constitutional limitations it becomes an absurdity, because it suggests we can remove ourselves from time.

The accolade of unitariness will not result in the wholesale dismantlement of desegregation plans. When unitary status is achieved and the injunction becomes inoperative, the immediate dismantlement of the plan without compelling reasons would certainly raise a question as to the board's intent and possibly subject it to further court supervision. Thus, the most likely and practical approach is for the board to continue to voluntarily follow the tenets of the desegregation plan until such time as demographic changes, educational policy or other legitimate non-discriminatory reasons compel the board to make necessary changes.

Indeed, this is precisely what happened in Oklahoma City. When the school board achieved unitary status in 1977, all further jurisdiction was relinquished and the case was closed. The court did not foresee that the board would take action which would result in the immediate "dismantlement of the plan." Brief in Opp., App. 2a. The Oklahoma City School Board voluntarily followed the tenets of the original plan for eight more years until, in 1985, demographic changes rendered the plan oppressive at the elementary level and prompted the board to assign students in grades 1-4 to neighborhood schools. Today, it implements the tenets of the plan at grades 5-12 where compulsory busing is still used to maintain racial balance. The approach we suggest in no way undercuts the constitutional rights of minority students. If the school board were to make any changes in student assignment with an intent to discriminate on the basis of race, then a new constitutional violation would be created and the district court would once again have remedial authority to correct that constitutional violation.

Once unitary status is achieved, the lifting of the injunction should become an administrative task. It is the achievement of unitary status, not mere dissolution of the injunction, which speaks to the board's past accomplishments and its future responsibilities. Indeed, as demonstrated by the foregoing decisions, this Court's emphasis has been directed at the dismantlement of dual systems, the achievement of unitary status, and finally the relinquishment of jurisdiction. As a result, the Court has heretofore never specifically emphasized the importance of dissolving the injunction. It is not surprising, therefore, that when the district court found the Oklahoma City School district unitary in 1977, it relinquished all further jurisdiction and closed the case, but did not in so many words specifically dissolve the injunction. "The board instituted the [K-4 neighborhood] plan believing, as did the [district] court, that the Oklahoma City schools were no longer subject to federal court supervision under *Swann*." *Dowell*, 677 F.Supp. at 1505.

Indeed, we submit this is precisely the reason the Fourth Circuit in *Riddick* and the Fifth Circuit in *Overton* ruled that

the achievement of unitary status coupled with an order terminating the case left the injunction inoperable in the absence of an order specifically dissolving it. To avoid any future misunderstanding, hindsight teaches the better course today would be for the court to enter an order dissolving the injunction, as the district court in Oklahoma City did in 1987. When the injunction is dissolved as an administrative matter there will be no doubt in the minds of the parties as to their future rights and obligations.

D. The "Swift" Standard, As Applied By The Court Of Appeals, Is An Inappropriate Guide For The Dissolution Of A Remedial Desegregation Injunction.

The majority of the panel writing for the court of appeals decided the dissolution question without giving any weight to the achievement of unitary status.[29] The panel majority relied on the standard set forth in *United States v. Swift and Co.*, 286 U.S. 106, 119 (1932), an anti-trust case, for the proposition that, despite unitariness, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" warrants dissolution of a desegregation decree. *Dowell*, 890 F.2d at 1490. However, as the dissenting panel member correctly observed, "[v]irtually all of the cases relied upon by [th]e court in its application of *Swift* involved unsuccessful attempts to obtain, modify or dissolve injunctions which forb[ade] or limit[ed] *private* commercial conduct." *Id.*, at 1514 (Baldock, J., dissenting) (emphasis added).

Under the Tenth Circuit's rule, it is "virtually impossible" to vacate or modify an injunction under the *Swift* standard when the beneficiary of the injunction does not consent. *S.E.C. v. Blinder, Robinson and Co., Inc.*, 855 F.2d 677, 679

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[29] *See, Dowell*, 890 F.2d at 1492 ("Nor, in our view, does a finding of unitariness mandate the later dissolution of the decree without proof of a substantial change in the conditions which led to the issuance of that decree. *Dowell*, 795 F.2d at 1521")

(10th Cir. 1988). Considering the constitutional principles previously reviewed, this simply cannot be true in the desegregation context.[30] We submit the Tenth Circuit's application of *Swift* failed to recognize that "[t]he issues involved in terminating a remedy generally mirror those a court faces when initiating a remedy." Gewirtz, *Choice in the Transition, supra*, at 790. Thus, the Tenth Circuit's application of the *Swift* standard in the desegregation context overlooked the importance of "local" autonomy, *Milliken II*, 433 U.S. at 280-82, and neglected to recognize that the remedy was designed "to repair the denial of a constitutional right," *Swann*, 402 U.S. at 16, and operate only during the "interim period" when remedial adjustments were being made to eliminate the dual school system. *Id.* at 28. Indeed, *Swift* itself distinguishes "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Swift*, 286 U.S. at 114.

Moreover, the Tenth Circuit overlooked the fact that the constitutional violation had been remedied once unitary status had been achieved. *See, Dowell*, 890 F.2d at 1490 ("The condition that eventuates as a function of the injunction [unitariness] cannot alone become the basis for altering the decree absent the *Swift* showing"). As the Fifth Circuit pointed out in *Overton*, 834 F.2d at 1176-77, this approach confuses the remedy with the constitutional violation.

Justice (then judge) Kennedy explained the inapplicability of *Swift* to a district court's termination of equitable jurisdiction in school desegregation cases in *Spangler v.*

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[30] The court of appeals erred by concluding that "Fed.R.Civ.P. 60(b) codifies th[e] [*Swift*] standard," *Dowell*, 890 F.2d at 1490. If was not the purpose of Rule 60(b) to codify substantive law. *See*, Fed.R.Civ.P. 60(b) advisory committee note (1946 amendment) ("It should be noted that Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.")

Pasadena Bd. of Educ., 611 F.2d 1239, 1245 n. 5 (9th Cir. 1979):

> *Swift* involved the efforts of anti-trust defendants who had entered into a consent decree prohibiting anti-competitive actions to modify the decree by lifting some of its prohibitions. It is doubtful the case supports the district court's retention of jurisdiction. *Swift* establishes general criteria for dissolution or modification of prohibitory injunctions against private wrongdoers. More recent Supreme Court desegregation decisions have established specific criteria for dissolution of regulatory injunctions imposed upon public school authorities . . . . [T]hese criteria recognize (1) that the proper function of a school desegregation decree is remedial, and (2) necessary concern for the important values of local control of public school systems dictate that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. *See, Milliken v. Bradley* (*Milliken II*), . . . 433 U.S. [267], at 280-82, 97 S.Ct. 2749 [1977].

Justice Kennedy is not alone. *See, e.g., Money Store, Inc., v. Harris Corp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) (Posner, J., concurring) (observing the *Swift* standard, applicable in litigation over property rights, is ill-suited in litigation designed to reform public agencies); [and] Landsberg, *The Desegregated School System and the Retrogression Plan, supra*, at 828 (the *Swift* "articulation has been criticized as having 'language perhaps too strongly adverse to the possibility of modification.' In any event, that standard probably does not apply to school desegregation decrees . . . ." [quoting Restatement (2d) of Judgments, Reporter's Note on Section 73, at 201 (1982)]).

This is not to say, however, that *Swift* as subsequently clarified by *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968) has no place in the desegregation context, assuming of course unitariness is afforded its true meaning. In *United Shoe*, the Court noted *Swift* emphasized the

power of a court of equity "to modify an injunction in adaptation to changed conditions though it was entered by consent," *Id.* at 248, and stressed that the question in *Swift* was "whether enough had been shown to justify" modification. *Id. United Shoe* pointed out the danger of monopoly which led to the initial decree in *Swift* had not been removed. Thus, although in some respects the *Swift* decree had been effectuated, there was still a danger of unlawful restraints on trade which justified perpetuation of the decree.

United Shoe clarified *Swift's* meaning by explaining that the earlier statement in *Swift* – "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change [the decree]" – must be read in the context of the continuing danger of unlawful restraints on trade which the Court found still existed. *Id.* In conclusion, the Court in *United Shoe* ruled that "Swift teaches . . . a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed . . . if the *purposes of the litigation* as incorporated in the decree . . . have not been fully achieved." *Id.* (emphasis added).

United Shoe is particularly instructive here, because in Oklahoma City "the purposes of the litigation" as incorporated in the decree had been "fully achieved" at the time the dual school system was successfully dismantled and unitary status was achieved. In fact, this is precisely the basis upon which the district court in 1987 dissolved the injunction in Oklahoma City. The court viewed it essential to determine whether the "purposes of the litigation" as incorporated in the 1972 desegregation decree had been "fully achieved." *Dowell*, 677 F.Supp. at 1522 (W.D. Okl. 1987). The court found the purposes of this litigation had been fully achieved upon the attainment of unitary status, and that the "substantial change in conditions" which over time resulted in the elimination of illegal discrimination was "precisely the change which compel[led] dissolving the 1972 decree." *Id.*

The Tenth Circuit's application of *Swift* neither considers the clarifying language of *United Shoe* nor affords unitariness any meaning. This standard can only serve to have a chilling effect on legitimate changes in education policy and to defeat

important governmental and personal interests, because the school board will be obligated under the governance of a continuing decree to take racial factors into account in making important policy decisions long after discrimination has been eliminated and unitary status has been achieved. We submit the most significant problem with *Dowell's* mandate for continued judicial superintendence is the lack of judicial accountability for the results. One of the virtues of local autonomy is that school board members are accountable to the electorate for their actions. The democratic process, therefore, helps to ensure the best education possible for our children. Federal courts, on the other hand, are not accountable for the impact judicial superintendence has on the educational process. If the quality of education in America is to prosper, the important values of local autonomy must not be displaced indefinitely.

E. Subsequent To The Achievement Of Unitary Status, Parties Challenging School Board Action Which Has A Disproportionate Racial Impact Shoulder The Burden Of Proving The Board Acted With Discriminatory Intent Before Federal Court Jurisdiction May Again Be Invoked.

Swann held that once unitary status is achieved, further court intervention is not warranted "in the absence of a showing that . . . school authorities . . . ha[ve] *deliberately attempted* . . . to *affect* the racial composition of the schools." *Swann*, 402 U.S. at 32 (emphasis added). Notwithstanding, the court of appeals "focus[ed] not on whether the plan [wa]s non-discriminatory but whether it solve[d] the problems created by the changed conditions in the district." *Dowell*, 890 F.2d at 1504. Rather than focusing on the question of intent, *Dowell* incorrectly framed the issue as "whether the board's action in response to the changed conditions ha[d] the effect of making the district '*un*-unitary' by reviving the effect of past discrimination." *Id.* at 1499. Framing the issue in this fashion led the court to erroneously conclude the neighborhood plan was unacceptable because if "restore[d] the effects

of *past* discriminatory intent remedied by the decree by recreating racially identifiable elementary schools." *Id.* at 1504.

1. Discriminatory Intent. – While it is true that "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system," *Dayton II*, 443 U.S. at 538, it is important to remember the discriminatory intent inquiry is relevant during the remedial phase of a case. In *Dayton I*, 433 U.S. at 420, the Court held:

> "[T]he duty of both the district court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in schools has long since ceased, is first to determine whether there was any action in the conduct or the business of the school board which was *intended* to, and did in fact, *discriminate* against minority pupils, teachers, or staff." (emphasis added)

Since the discriminatory intent inquiry is the pertinent focus in the remedial phase of a case when the dual school system is being disestablished, it is beyond us how the Tenth Circuit concluded that it is not the test in judicial proceedings subsequent to the achievement of unitary status. The presence of racial imbalance in schools in the absence of a showing of discriminatory purpose constitutes "*de facto* segregation." *Swann*, 402 U.S. at 17-18. "[T]he differentiating factor between *de jure* segregation and . . . *de facto* segregation . . . is *purpose* or *intent* to segregate", *Keyes*, 413 U.S. at 208. Therefore, *de facto* segregation does not violate the Constitution. In Oklahoma City residential segregation has resulted in certain racially identifiable elementary schools, but in the absence of a showing of discriminatory purpose they are *de facto* segregated, do not violate the Constitution, and therefore do not warrant a remedy.

Moreover, the Tenth Circuit's conclusion that the neighborhood plan was impermissible because it restored "the effects of past discriminatory intent," *Dowell*, 890 F.2d at 1504, does not equate with a showing of unconstitutional purposeful discrimination. Discriminatory intent may not be

inferred solely from the "disproportionate impact" of a particular measure upon one race. *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 265 (1977). Nor does the "foreseeability of segregative consequences make out a prima facie case of purposeful race discrimination." *Dayton II*, 433 U.S. at 536-537 n. 9. As this Court stated in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979):

> " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group."

It is indeed perplexing why the Tenth Circuit found "discriminatory intent" was not the test, and yet went on to conclude the district court's findings with respect to the lack of "discriminatory intent" were "clearly erroneous." Be that as it may, as we will demonstrate later, the district court's finding that the plan was adopted for non-discriminatory purposes was not "clearly erroneous." By virtue of the remand instructions of the Tenth Circuit, the defendants carried the burden of persuasion in the proceedings below, and proved to the satisfaction of the district court that its neighborhood school plan was not adopted for discriminatory purposes. Even though the procedural framework of the proceedings placed the Board of Education in the position of proving its non-discriminatory purpose, respondents should have carried the burden.

2. Burden of Proof. – In a dual school system there is an increase in the probability that subsequent segregation might result from the same wrongful intent. Thus, the school board should bear the burden of justifying resegregatory actions from the time of the initial finding of the violation until the system becomes unitary.

However, since the burden allocation in a desegregation case is premised on "policy and fairness", *Keyes*, 413 U.S. at

2698, we submit the achievement of unitary status – signifying the elimination of illegal discrimination and its vestiges – should shift the burden to those challenging action which has a disproportionate racial impact, to prove the measure was adopted with the intent to discriminate on the basis of race before federal court jurisdiction could again be invoked.

Opponents to this position argue that the school board should continue to carry the burden of proof because it was the party that was guilty of purposeful discrimination originally, and it is sufficiently likely it will return to its bigoted ways. Another argument is that since the school board has superior access to proof and superior knowledge of the facts, it is better able to prove its intent. Arguments such as these, however, do not pass muster when scrutinized. As the Fifth Circuit in *Overton* recognized:

> The elements of a violation and who must bear the burden of their proof are not conceptually distinct from unitary status but are its components; indeed, the contrary assertion is dissembling. In the real world of trial and uncertain proofs, a perpetual placement upon a school board of the burden of persuading its innocence of conduct with segregative impact differs little in effect from the superintendence that attends an extant decree and pending suit. The argument . . . rests upon a fear that the Fourteenth Amendment, proscribing as it does only purposeful discrimination, inadequately protects desegregation gains, at least at the hand of a former wrongdoer.

Overton, 834 F.2d at 1176.

In *Overton*, the Fifth Circuit concluded that the end of judicial superintendence that accompanies unitary status results in the "release of [the] unitary district from the burden of proving that its decisions are free of segregative purpose." *Id.*, at 1175. *See also, Riddick*, 784 F.2d at 538 ("We hold that the burden of proving discriminatory intent attaches to a plaintiff once a *de jure* segregated school system has been found to be unitary.")

While the Oklahoma City School Board was placed in the posture of having to prove it did not adopt its neighborhood

school plan with discriminatory purpose, and aptly did so, we urge the Court to clarify the principles of burden-allocation in the post-unitary phase of a case, and hold that subsequent to the achievement of unitary status, parties challenging school board action which has a disproportionate racial impact shoulder the burden of proving that the action was motivated by discriminatory purpose.

3. Residential Segregation and Neighborhood Schools. – At this juncture, it is important to point out this Court's previous recognition that "[a] neighborhood school policy in itself does not offend the Fourteenth Amendment." *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 537-538 n. 15 (1982); *Accord, Swann*, 402 U.S. at 28. Thus, "[a] policy favoring neighborhood schools is not synonymous with an intent to violate the Constitution," *Spangler*, 611 F.2d at 1245 (9th Cir. 1979) (Kennedy, J., concurring), and "[a]n easily visible correlation between school segregation and residential segregation cannot by itself justify the blanket extension of a remedy." *Columbus v. Penick*, 443 U.S. at 478-79 (Stevens, J., concurring).

The benefits of neighborhood schooling are well known and too numerous to review here. *See, e.g., Keyes*, 413 U.S. at 245-247 (Powell, J., dissenting). Suffice it to say, it is the policy of the United States that "[t]he neighborhood is the appropriate basis for determining public school assignments," 20 U.S.C. §1701(a)(2), and likewise the policy of the state of Oklahoma that "insofar as practicable, each pupil shall be assigned to the school nearest his residence." OKLA. STAT. TIT. 70, §1210.203 (1970). Our point is simple. The policy behind and benefits of neighborhood schooling in America should not be undermined in the absence of a showing that such a plan was adopted in violation of the Constitution, or, in other words, adopted for purposefuliy discriminatory reasons.

It is important to remember that in Oklahoma City, "[t]he Board did *not* originate [the] patterns of residential racial segregation." *Dowell* 307 F.Supp. 583, 594 (W.D. Okl. 1970) (emphasis added). Additionally, Mr. Rabin, the expert witness for respondents who had studied the school district in great detail, testified he was not aware "of any action the board

took" following the district court's entry of its 1963 decree "which compelled" blacks to live in any residentially segregated neighborhood in Oklahoma City. (R. vol. VIII 1154-55). There are racially-imbalanced schools in every major urban area in the country that contain a substantial minority population. The evidence in this case demonstrated, as Justice Powell previously observed, that residential segregation "results primarily from familiar segregated housing patterns, which – in turn – are caused by social, economic and demographic forces for which no school board is responsible." *Columbus v. Penick*, 443 U.S. at 480 (Powell, J., dissenting).

The uncontroverted evidence showed that in Oklahoma City residential segregation cannot be eliminated by court order, board policy or otherwise (R. vol. II 115; vol. VIII 1246). It is a reality in Oklahoma City as it is in most other large urban cities. Thus, whether a neighborhood plan is adopted today, or twenty-five years from now, it will result in the creation of some racially identifiable schools. To say that the Oklahoma City School Board must maintain racial balance in its elementary schools to control the effects of residential segregation, is to say that the board must continue to bus its young students until such time residential segregation is eliminated. The elimination of residential segregation is not possible and certainly not required by the Constitution.

Respondents stress that some schools which were racially identifiable prior to court-ordered desegregation in Oklahoma City remain racially identifiable under the new plan. While this observation is not insignificant, it overlooks the fact that unlawful discrimination and its vestiges were removed from the Oklahoma City School District when it was declared unitary in 1977, and that no showing has been made to date demonstrating that the plan was adopted for unlawful discriminatory purposes.[31] In this context, we believe Professor Landsberg is correct:

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[31] While we agree that the history of discrimination in Oklahoma City cannot be ignored, it "cannot in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion of the Court by Justice Stewart).

> Racial identifiability occurs because particular racial plants were built to serve one race or another and are associated in the minds of the public, including school children, with that race. Importing teachers and students of the other race into such schools eliminates at least some indicia of racial identifiability. If the school operates on a desegregated basis sufficiently long, public memory that the state designed the school to serve a particular race may fade. A return to neighborhood schools, under these circumstances does not necessarily entail a return to the former racial identity of the school. Although the former racial composition of the student enrollment may remain, that occurrence need not carry with it the stigma of the state's original designation. Such a school would be no different from a *de facto* segregated northern school."

Lansberg, *Retrogression Plan, supra*, at 819-820.

If the achievement of unitary status coupled with thirteen years of sustained good-faith compliance with a desegregation decree at the elementary level is insufficient to bring about the desired objective in Oklahoma City, then nothing short of busing our young students in perpetuity is, and nothing is worth that resolve.

4. Maintaining Unitary Status. – Notwithstanding the binding unitary declaration in Oklahoma City, the Tenth Circuit ruled the board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects." *Dowell*, 890 F.2d at 1504-1505 (quoting *Dayton II*, 443 U.S. at 538). This observation is incorrect.

It is only a school system "under an unsatisfied duty to liquidate a dual system" which must meet the burdens and presumptions flowing from the "affirmative duty" to desegregate. *Dayton II*, 443 U.S. at 538; *Swann*, 402 U.S. at 15. *Swann* ruled with clarity that once unitary status is achieved "the affirmative duty to desegregate has been accomplished." 402 U.S. at 32. *Accord Spangler*, 427 U.S. at 434. Therefore,

a school system which has achieved unitary status is relieved of the "affirmative duty" to desegregate, and returned to the same status as any other state actor. In order to maintain its unitary status, therefore, it must simply refrain from purposeful discrimination which would violate the Constitution.

II. THE COURT OF APPEALS' REASSESSMENT OF THE EVIDENCE, AND THE CHARACTERIZATION OF THE TRIAL COURT'S FINDINGS OF FACT AS CLEARLY ERRONEOUS, EXCEED THE CONFINES OF FED.R.CIV.P. 52(a).

A considered reading of the majority and dissenting opinions in *Dowell* leaves the unmistakable impression that the majority approached this case with the preconceived idea of a desired result, and then searched the record for any evidence to support it. Appellate review appears to have been directed towards a search for error, rather than the truth and in deference to the trial court,[32] with a resultant failure to abide by the confines of Fed.R.Civ.P. 52(a) and certain deviation from the function of an appellate court. Fed.R.Civ.P. 52(a) requires that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This standard

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[32] As noted by the dissent, the majority's appellate fact-finding, while not only impermissible, was also not error free. 890 F.2d at 1533. The majority noted that the student reassignment plan was implemented in 1984, *Id.* at 1486, when in reality the plan was implemented in the 1985-86 school year. (R. vol. III 302). The majority also found that "thirty-two of the sixty-four elementary schools in Oklahoma City emerge from the plan as one-race majority schools," *Id.* at 1493. While not only calculated by a percentage employed by neither of the parties, *Id.* at 1487 n. 2, the majority reached this figure despite testimony by respondents' own witnesses that there were no ninety percent or more white schools. (R. vol. VIII 1207-08, 1351-52). Certainly a suspect pall is cast over the majority's review of facts when such errors appear in the summation of evidence.

precludes *de novo* review of the district court's findings and emphasizes that "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). A reviewing court cannot set aside findings of fact because it would view the facts differently, or give greater weight to certain evidence than the trial court. It is apparent that rather than the objective review required, the *Dowell* majority approached the evidentiary scales as fact-finder, reweighed the evidence, and in the process placed excessive sociological weight on the scales in favor of respondents.

The standard enunciated in Fed.R.Civ.P. 52(a), and repeatedly emphasized by this Court, does not require blind adherence to the trial court's findings of fact but certainly demands deference to the trial judge. Moreover, the nature of a desegregation case commands appellate review within the close strictures of Fed.R.Civ.P. 52(a). "[T]he elimination of the more conspicuous forms of governmentally ordained racial segregation over the last twenty-five years counsels *undiminished deference* to the factual adjudications of the federal trial judges in [school desegregation] cases, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit." *Columbus v. Penick*, 443 U.S. 449, 470 (1979) (Stewart, J., joined by Burger, C. J., concurring) (emphasis added). *See also, Spallone v. United States*, 107 L.Ed.2d 644, 665 n. 4 (1990) (Brennan, J., dissenting); *Dayton II*, 443 U.S. at 543 (Rehnquist, J., joined by Powell, J., dissenting); *Swann*, 402 U.S. 12.

To do otherwise, and, in essence, require that a party persuade not only the trial judge, but also an appellate panel that their account of the facts is correct both invades the province of the trial court and ignores this Court's mandate that "the trial on the merits should be 'the main event' . . . rather than a 'tryout on the road' ". *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 [1977]).

While the docketing statement and briefs filed by respondents with the Tenth Circuit are barren of any assertion that

the district court's factual findings on the issue of intent was clearly erroneous, the court of appeals nevertheless addressed this issue. Notwithstanding that the burden is on the appealing party to preserve the issues, and that the appellate court must view the evidence in the light most favorable to the party who prevailed below, the majority dismissed those factual findings as clearly erroneous. As demonstrated by the trial court and so meticulously discussed by the dissent, the evidence was sufficient to warrant findings that 1) the Plan was adopted for legitimate non-discriminatory reasons, 2) the district remained unitary in 1987, and 3) the relationship between past segregative acts and present residential segregation had become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention.[33]

A. Lack of Discriminatory Intent.

In part to arrive at the finding that the student reassignment plan was adopted without discriminatory intent and for legitimate reasons, the trial court questioned various witnesses on the subject. The court was criticized by the majority because "discriminatory intent cannot be ascertained by eliciting opinion testimony from witnesses, . . . and accumulating those responses as substantive evidence of the motive for the Plan." 890 F.2d at 1503. The majority was persuaded that only circumstantial evidence should be utilized to establish segregative intent, or lack thereof. When the only evidence offered on intent by respondents was that the plan had a disproportionate impact upon some blacks in the school district, the district court correctly realized that this fact was insufficient to demonstrate an intent to discriminate on the basis of race. *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 265 (1977); *Dayton Bd. of Educ. v. Brinkman*, 443

[33] Indeed, the majority found there was "evidence to facially support the district court's findings." 890 F.2d at 1504. Where, as here "there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574.

U.S. 526, 536-537 n. 9 (1979) (*Dayton II*). Even respondents' witness, Dr. Taylor, found no evidence of discriminatory intent in connection with the adoption of the plan.[34] (R. vol. VIII 1237-38).

Surely, in light of all the evidence to the contrary, 890 F.2d 1523 n. 15, and especially when confronted with direct testimony regarding the lack of discriminatory intent in the plan's adoption from *both* parties, coupled with the ability to observe delivery of that testimony, it was reasonable for the court to conclude such intent was absent.

The district court's assessment of the motivating factors behind the plan's adoption and implementation is sound. The increased busing burdens on young black students as well as the threatened closure of schools in the northeast quadrant precipitated study and eventual modification of the Finger Plan (R. vol. IV 425-426). The court found a desire for increased parental participation, with its positive effects on educational achievement, as well as increased community involvement and support, were motivating factors in adoption of the plan. By contrast, no evidence was offered on behalf of respondents regarding intent aside from the disproportionate impact the plan had upon some blacks in the school district. Due deference to the trial court's finding on the issue of intent must recognize the propriety of that finding.

B. Maintenance of Unitary Status.

Respondents did not assert on appeal that the lower court's factual findings were clearly erroneous with respect to

[34] It is noteworthy that the court's questions were directed at a number of top level black administrators employed in the district. Each of these administrators responded that they detected no discriminatory animus behind the adoption or implementation of the plan. (R. vol. III 311; vol. IV 576; vol. V 586, 788, 798, 812). Also of note is Dr. Taylor's testimony regarding the positive impact of placing black individuals in positions of institutional responsibility. Even so, she was not aware of the racial composition of the Oklahoma City Schools' top administration until cross-examined regarding how such knowledge affected the formulation of her opinions. (R. vol. VIII 1241-43).

the unitary status of the district, and only contested that status at trial as to student population and faculty assignment. While evidence was presented by respondents in an effort to demonstrate a vestige of segregation remaining in Oklahoma City in that some schools with a higher concentration of black students had more black teachers than other elementary schools, the court found that contention without merit. The court noted the evidence showed the teacher and administrator preferences to a large extent determined faculty assignments following implementation of the plan and resulted in a larger percentage of black faculty in the majority black elementary schools. Nevertheless, efforts were exerted and did bring the faculty staff ratios into alignment with district wide ratios (R. vol. IV 570; vol. V 811, 814). In addition, Dr. Foster, respondents' expert witness, agreed that the efforts by the Board of Education and administration would completely bring the faculty assignments within racial balance and that any imbalance was not the result of an intent to discriminate (R. vol. VIII 1276; vol. IX 1388-1389). No evidence was presented that extra-curricular activities, expenditures, facilities, or transportation were not unitary in 1987. As repeatedly acknowledge from the stand, no student is compelled to attend any school on the basis of race (R. vol. VII 1097; vol. VIII 1196, 1255). The trial court's finding of continued unitary status must be upheld.[35]

C. Attenuation of Conditions.

The lower court was fully justified in concluding that the relationship between past segregative acts and present residential segregation had become so "attenuated" as to be

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[35] Evidence demonstrated funding for the predominately black elementary school exceeded that for schools with less than 10% black population (R. vol. V 727), those facilities were maintained equally (R. vol. V 792-795), that teacher expectations for students were consistently high in all schools (R. vol. VI 889; vol. IV 535), and that extra-curricular activities were integrated. Finally it was uncontroverted that grades 5-12 remained fully integrated in all aspects.

incapable of supporting a finding of de jure segregation warranting judicial intervention. The court determined there had been a substantial change in conditions, totally eliminating the vestiges of unlawful discrimination from Oklahoma City, which warranted dissolving the 1972 desegregation decree. Previous state-imposed barriers had been removed which prevented the black population from disbursing throughout the community. Effective remedies were in place to combat remaining private prejudice.[36] Witnesses testified without contradiction that today black people in Oklahoma City voluntarily choose where they wish to reside (R. vol. III 313; vol. V 678). The migration of the black population into previously all white neighborhoods has had a direct impact on the racial compositions of the schools in Oklahoma City. Black students now reside in every neighborhood attendance area in the Oklahoma City School District. This is a dramatic departure from the situation in 1972 when virtually no black students resided in thirty-nine of the same attendance areas (Def.Ex.11, R. vol. II 136, vol. III 295).

Remaining residential segregation has many causes. To place the burden and consequences of societal prejudice on the school district as a cause of residential segregation and disproportionate racial concentrations in some schools exceeds the constitutional mandates of this Court. The uncontroverted evidence demonstrated that no school district nor any desegregation decree can completely eliminate residential segregation. Even so, testimony acknowledged that the school district had experienced drastic demographic changes in residential patterns which almost doubled the exposure of blacks to whites since the early 1960's. The lower court's decision to give more credence to the evidence offered on behalf of the

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[36] The district court detailed the protective legislation which has replaced former segregative laws, ordinances and restrictive covenants. 677 F.Supp. 1503 at 1511. Further, witnesses called on behalf of each of the parties noted their membership on the Metropolitan Fair Housing Board and Council, and the success that organization has experienced in combating private housing discrimination (R. vol. III 298; vol. VII 1167, 1176).

school district with regard to the substantial change in conditions and attenuation of residential segregation cannot be clearly erroneous. Indeed, *Dowell's* failure to defer to the district court's findings "is difficult to fathom". *See, e.g., Amadeo v. Zant,* 486 U.S. 214 (1988).

In sum, "[W]hen the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the district court's conclusion was clearly erroneous." *Anderson v. Bessemer City,* 470 U.S. 567, 577 (1985).

CONCLUSION

For the foregoing reasons the decision of the Tenth Circuit Court of Appeals should be reversed, and the decision of the district court should be affirmed and reinstated in its entirety.

Respectfully submitted,

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BEST AVAILABLE COPY

Counter-Statement of Question Presented for Review

A single question arises on the facts of this case:

May a school district that obeys a federal court order requiring it to implement a new student assignment plan to accomplish desegregation, consistent with the Fourteenth Amendment and equitable principles, dismantle that plan, and thereby re-create the all-Afro-American schools whose elimination was the purpose of the court order, when the uncontroverted evidence demonstrates that the conditions that made the order necessary (racial residential segregation that the court determined to have resulted from official state action including action of the school authorities) yet persist?

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No. 89-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

In addition to the opinions listed by Petitioner, the following opinions of the United States District Court for the

Western District of Oklahoma and the Court of Appeals for the Tenth Circuit are relevant to the decision of this case. 219 F. Supp. 427 (1963); 244 F. Supp. 971 (1965); 307 F. Supp. 583 (1970); 338 F. Supp. 1256 (1972); 606 F. Supp. 1548 (1985)(J.A. 177-196); 375 F.2d 158, *cert. denied*, 387 U.S. 931 (1967); 465 F.2d 1012, *cert. denied*, 409 U.S. 1041 (1972); 795 F.2d 1516, *cert. denied*, 479 U.S. 938 (1986)(J.A. 197-214).

STATEMENT

A. Early Stages of the Litigation

This action was brought in 1961 by Afro-American children and their parents to end the *de jure* segregation of the public schools in Oklahoma City, Oklahoma. Prior to *Brown v. Board of Education*, 347 U.S. 483 (1954)(*Brown I*) separate schools for Afro-American and white students had been required by the constitution of Oklahoma since its

admission into the Union as a "Jim Crow State" in 1907. *Dowell v. School Bd. of Oklahoma City Public Schools*, 219 F. Supp. 427, 431 (W.D. Okla. 1963).[1]

Shortly after *Brown v. Board of Education*, 349 U.S. 294 (1955)(*Brown II*), the Oklahoma City School Board adopted, for the first time, a plan of neighborhood schools, ostensibly to end segregation. However, all the plan did was to impose local attendance zones on housing that was rigidly segregated by race. The pattern of residential segregation had been created by statute, through the enforcement of restrictive covenants until the decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948),[2] and by other practices of the state, city, and school district. As the district court found:

---

[1] Racially separate schools had evidently been in place before statehood as well. 219 F. Supp. at 434, quoting the Oklahoma City School Board's 1955 "Statement Concerning Integration."

[2] See *Dowell v. School Bd. of Oklahoma City*, 244 F. Supp. 971, 975 (W.D. Okla. 1965).

> The residential pattern of the white and Negro people in the Oklahoma City school district has been set by law for a period in excess of fifty years, and residential pattern has much to do with the segregation of the races. . . . Thus the schools for Negroes have been centrally located in the Negro section of Oklahoma City, comprising generally the central east section of the City. . . . The patrons of the School district had lived under a dual school system and the children's residential areas were fixed by custom, tradition, restrictive covenants and laws.

219 F. Supp. at 433-434. Indeed, the establishment of neighborhood schools intensified patterns of residential segregation, with white families moving out of the east central area of the city where Afro-Americans were concentrated, and Afro-Americans moving in. Moreover, even those white families who remained in the Afro-American ghetto were allowed to transfer their children from their school attendance areas to areas where whites predominated in the schools. In light of these facts, the court concluded that the defendants had not made a good faith effort to integrate the schools. *Id.* at 434-35.

Two years later, the district court again found the school district's proposed integration plan wholly inadequate because it adhered to a neighborhood school policy, and:

> . . . such a policy when superimposed over already existing residential segregation initiated by law in Oklahoma City, leads inexorably to continued segregation. . . . [I]nflexible adherence to the neighborhood school policy in making initial assignments serves to maintain and extend school segregation by extending areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools.

Dowell v. School Bd. of Oklahoma City, 244 F. Supp. 971, 976-77 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).

B. The 1972 Desegregation Order

In 1972 the district court held that the desegregation plan put into effect by the school district in 1970 had been ineffective and that the school board had "totally defaulted in its acknowledged duty to come forward with an acceptable

plan of its own." *Dowell v. School Bd. of Oklahoma City*, 338 F. Supp. 1256, 1271 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied,* 409 U.S. 1041 (1972). Indeed, the plan was *not* "the plan approved by [the] court" since "the Defendant School Board, without notice to or permission to the court, [had] proceeded to emasculate the plan." *Id.* at 1262, 1263. With regard to elementary schools in particular, the school board's plan resulted in 69 ~~of 86~~ schools remaining 90% or more predominantly white or Afro-American. *Id.* at 1260. Sixteen of those schools were virtually all-Black, with white enrollments from 0 to 1.7%. Again, the vice of the school board's approach was that it imposed a neighborhood school plan on segregated residential patterns.

Finding that the school board's plan "will not work" to desegregate the schools and eliminate the vestiges of segregation, the district court adopted the plaintiffs' plan

(The Finger Plan) and held that it "would, if adopted and implemented in good faith, create a unitary system." *Id.* at 1269, 1271. The Finger Plan utilized a variety of methods, including grade restructuring and school clustering, transportation, restructuring of school boundaries, and feeder schools to integrate fully the elementary, junior high, and high schools. The district court's order was affirmed on appeal, and the Finger Plan was implemented in the Fall of 1972.

C. The 1977 "Unitary" Order

The Finger Plan desegregated the schools of Oklahoma City at all levels. In its 1972 order, the district court required that:

> The Defendant School Board shall not alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court. If the Defendant is uncertain concerning the meaning of the plan, it should apply to the court for interpretation and clarification.

338 F.Supp. at 1273. This order was not vacated until 1987. In 1975, the Board of Education filed a motion requesting dismissal of the lawsuit on the ground that the School District had complied with the 1972 order. At a hearing held on November 18, 1975, the then president of the school board testified that the board did not seek dismissal of the case in order to return to segregated schools.

> [THE COURT:] The Court would like to ask you, if the Court should terminate its jurisdiction, will this mean that the Board will terminate its busing program for desegregation?
>
> THE WITNESS: No, sir.
>
> THE COURT: Would it mean that you would lessen your busing program to any degree?
>
> THE WITNESS: No, sir.
>
> THE COURT: Do you know of any other way in which you can bring about desegregation except through busing?
>
> THE WITNESS: I think that it's certainly going to require transportation of some sort, busing of some

> nature.

Plaintiffs' Exhibit ("PX") 55 (Transcript of hearing of November 18, 1975, p. 69) (J.A. 103-04).

Subsequently, on January 18, 1977, the district court entered an "Order Terminating Case" that recited that the Finger Plan:

> worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and *the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished* over the 16 years during which the cause has been pending before the Court.
>
> . . . The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements. (Emphasis added.)

(J.A. 174-75.)

Although the case was dismissed, the permanent injunction was not dissolved. For eight more years the

expectation of the court and of plaintiffs was fulfilled, and the school district continued to operate a desegregated school system under the Finger Plan until the 1985-86 school year.

D. The Dismantling of Elementary School Desegregation

Over the course of implementing the Finger Plan, the greatest part of the burden of busing for integration of the elementary schools fell on Afro-American students. Under the plan, formerly Afro-American schools became fifth-year centers serving only the fifth grade and kindergarten. As a result, Afro-American elementary-grade children living in the northeast quadrant and other predominantly black areas of Oklahoma City were transported four out of five years, while white students were bused only in the fifth grade. Witnesses for both plaintiffs and defendants agreed that this was inequitable. Transcript of Hearing, June 15-24, 1987 ("Tr."), pp. 220; 292; 385; 432-33; 512; 642; 1265; 1412-

13; 1431-33 (J.A. 283-83; 303-04; 330; 341-42; 347; 384; 501; 516-18; 521-23.)

The inequity resulted in part from the failure of the school board to change student assignments to add grades to schools in the northeast quadrant, although this was suggested by the school system's research staff. Tr. 498-99 (J.A. 345-46). The school district's own expert witness testified that in light of the demographic change, the addition of grades would have been essential to maintain integration with a minimum amount of busing. Tr. 292-93 (J.A. 303-04).

Another source of inequity was the "stand-alone" school feature of the Finger Plan and the manner in which it was administered by the school district. Under the plan, any elementary school within a grade-restructured cluster that could itself be desegregated, by establishing a contiguous geographic attendance zone around the school that would

result in a student body more than 10% but less than 35% Afro-American, would be withdrawn from a grade-restructured cluster of schools, and would operate as a school enrolling grades K-5.[3] Because of demographic patterns, the creation of "stand-alone" schools in certain areas could lead to the closing of schools in the northeast quadrant, where the Afro-American population was concentrated, and to increased busing of students living in that quadrant.[4]

---

[3] Under the Finger Plan the clustered schools were divided into ones that served Kindergarten and grade 5, and ones that served grades 1-4. All Kindergarten children went to schools in their own neighborhoods, Afro-American children were bused when they were in grades 1-4, and white children were bused when they were in grade 5. A "stand-alone" school served all children in grades K-5 who lived in a contiguous geographic attendance zone that produced a desegregated student body.

[4] White students in grade 5 were bused into schools in the Afro-American neighborhood. Therefore, the creation of "stand-alone" schools in predominantly white neighborhoods reduced the number of fifth graders available for transportation, and therefore reduced the total student body of schools in Afro-American areas. Once the student body fell below to a certain level, a school was closed. At the same time, the conversion of a school that was near an Afro-American neighborhood to "stand-alone" status meant that Afro-American students in grades 1-4 would have to be bused longer distances to another clustered school.

In 1984, the school board decided to establish the Bodine Elementary School as a K-5 "stand-alone" school. Defendant's Exhibit ("DX") 76 (J.A. 586). Dr. Clyde Muse, an Afro-American school board member, expressed concern about the increase of the already inequitable busing burden on Afro-American students from the northeast quadrant. The school board established a committee to examine the question, and in its report of November 19, 1984, the committee recommended that K-4 neighborhood schools be established throughout the district. PX 9.

The committee and the school board were fully aware that the elimination of the Finger Plan's clustering approach for the elementary schools would result in reestablishing elementary schools that had heavily Afro-American or non-Afro-American student enrollments.[5] Nevertheless, on December 17, 1984, and without notification to or approval

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[5] DX 79, p. M-3 (Minutes of Board of Education meeting, November 19, 1984)(J.A. 602-08).

by the district court as required by the outstanding permanent injunction, the Board of Education approved the plan, dismantling the Finger Plan's clustering approach and substituting geographically zoned "neighborhood" schools serving grades K-4. Although some portion of the Afro-American community supported the abandonment of clustered schools, their support was based on the reduction of the inequitable busing burden on Afro-American children and the retention of elementary schools in the northeast quadrant. Tr. 642 (J.A. 384). However, other Afro-American parents objected to the new plan because it would result in re-segregating the district's elementary schools. PX 56, M-5; Tr. 512; 1412-13; 1431-33 (J.A. 552-60; 347; 517-18; 521-23).

The plan adopted in 1985 remains in effect today. The elementary school zones established by the 1985 plan are the same as those used in 1971 and earlier, except for

modifications necessitated over the years because of school closings. As the following table demonstrates, ten schools that were *segregated* in 1971, but that were *desegregated* from 1972 until 1984-85 by the Finger Plan, were *resegregated* in 1985 by the unilateral abandonment of the Finger Plan and the re-imposition of neighborhood zones on segregated housing.

School	% Afro-American Enrollment		
	1971-72[6]	1984-85[7]	1985-86[8]
Creston Hills	100.0	41.4	99.0
Dewey	99.2	33.5	96.6
Edwards	99.7	29.7	99.5
Garden Oaks	100.0	36.9	99.0
King (formerly Harmony)	99.7	43.2	99.7
Lincoln	99.1	36.9	97.2
Longfellow	99.3	32.2	99.6
Parker	99.7	72.3	97.3
Polk	97.8	31.6	98.4
Truman	100.0	27.6	98.7

[6] Source: 338 F. Supp. at 1260.

[7] Source: PX 50 (J.A. 543-45).

[8] Source: 677 F. Supp. at 1510.

All of the above schools except Parker are located in the northeast quadrant. Moreover, in 1971 the attendance zones of Creston Hills, Dewey, Dunbar, Edison, Edwards, Garden Oaks, Lincoln, Longfellow, Page, and Woodson defined the outer boundaries of the northeast quadrant. In 1985-86 the same geographic area was defined by the attendance zones of Creston Hills, Dewey, Edwards, Garden Oaks, Lincoln, and Longfellow. Thus, when allowances are made for the closing of some schools, the elementary school zones under the plan adopted in 1985 are operationally the same as those used before 1972. As described above, it was the segregative effect of neighborhood zones on this very area that was the basis for rejecting neighborhood schools in 1972.

The immediate consequence of the new plan was that, in the school year 1985-86, 40% of the Afro-American children in grades 1-4 attended these ten virtually all-black

schools. Overall, 44.7% of the district's Afro-American pupils in those grades attended schools with enrollments greater than 90% Afro-American,[9] in a school system in which 36% of the elementary school children are Afro-American.[10]

E. The Plaintiffs' Motion to Reopen the Case

On February 19, 1985, immediately after the adoption of the neighborhood school plan, plaintiffs (respondents here) moved to reopen the case to challenge the plan's validity. After a hearing, the motion was denied on the ground that "once a school system has become unitary, the task of a supervising federal court is concluded." 606 F. Supp. 1548, 1555-56 (W.D. Okla. 1985)(J.A. 192). The Tenth Circuit reversed and remanded the matter with instructions for the

[9] PX 26, 27.

[10] 677 F. Supp. at 1510.

district court to determine whether "changed conditions require modification or [whether] the facts or law no longer require the enforcement of the [1972 injunctive] order." 795 F.2d 1516, 1523 (10th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986)(J.A. 213).

On remand from the court of appeals the district court granted the motion to reopen and held a hearing from June 15 through June 24, 1987. At the hearing the school board had the burden of demonstrating sufficiently changed conditions to justify the dissolution of the permanent injunction. An issue central to the district court's decision was whether the continuing residential segregation, and particularly the virtually all-Afro-American northeast quadrant in which the elementary schools in question were still located, continued to be the result of the prior actions of various governmental agencies, including the school board. In other words, the issue was whether the effects of the prior

unlawful discrimination and segregation had become so attenuated as to no longer contribute to the still-existing housing segregation.

Petitioner's chief witness with regard to this issue was William Arthur Valentine Clark, a professor of geography at the University of California at Los Angeles. Dr. Clark was qualified as an expert in population geography and demography and testified as to population movements in Oklahoma City. He first testified that the original concentration of Afro-Americans in certain sections of the city was due in substantial part to city ordinances that restricted the areas in which they could live.[11] However, he said that beginning in 1968 and continuing into the 1970's the passage of fair housing laws at the federal, state, and local levels removed the legal barriers to Afro-Americans

[11] Professor Clark testified that such ordinances were in force as late as the 1930's. Tr. 46 (J.A. 236). Of course, this Court had held that such laws were unconstitutional in 1917. *Buchanan v. Warley*, 245 U.S. 60 (1917).

living in other parts of the city, with the result that by the early 1980's there had been a dispersal of Afro-American families into previously all-white areas. However, the East inner part of city remained virtually all-Afro-American, although a smaller proportion of the total Afro-American population resided there than previously.[12]

On direct examination Dr. Clark expressed the opinion that the all-Afro-American tracts in the East inner section were not a vestige of state actions of 30 to 40 years ago. However, on cross-examination Dr. Clark reiterated his testimony that whites would not move into areas where the Afro-American population was above 20-25%; indeed, whites tend to move *out* of neighborhoods that reach around 30% Afro-American.[13] Therefore, it was Dr. Clark's opinion that whites would not be expected to move into the

[12] Tr. p. 67 (J.A. 246).

[13] *Id.*, at 105 (J.A. 257-58).

established Afro-American residential areas and, consequently, into the newly established school attendance zones.[14] Thus, the past official segregatory actions resulted in Afro-American neighborhoods into which whites would not move.

> Q. And does it not therefore follow that, to the extent that past discrimination was a factor in establishing concentrated minority residential areas, that those areas are unlikely to change because of the antipathy of whites to moving in unless and until their black residents move somewhere else?
>
> A. I think that you would have to agree with that, given what I've testified. Yes.
>
> * * *
>
> Q. . . . [A]s long as school attendance is determined by residential zones, such as those which have been drawn which overlay areas of established black concentration, you wouldn't anticipate white families moving into those areas?
>
> A. I would not anticipate white families moving in. No.[15]

[14] *Id.* at 106 (J.A. 258).

[15] *Id.*, at 106-107 (J.A. 258-60).

The testimony of one of respondents' witnesses, Professor Mary Lee Taylor, fully corroborated this conclusion of Dr. Clark. Dr. Taylor noted that while Afro-Americans had moved into formerly all-white areas, the reciprocal change had not occurred. The reason was that "white residents are not going to move into historically black areas."[16] This is particularly true where white aversion to moving into a heavily Afro-American neighborhood is tied to a history of official discrimination and segregation, including the maintenance of segregated schools.

> A. Yes, I think there's a lot of evidence that white attitudes about desegregation are, in fact, shaped by the history of segregation that those whites have been exposed to. . . . [I]n places like Oklahoma City, where the black neighborhood was created by state action, the involvement of public officials, the fait accompli phenomenon implies that white avoidance of desegregation would be particularly great for that reason. In other words, the official segregation encourages attitudes that . . . segregation is appropriate, justified, that it . . . would be undesirable for whites to live in

[16] *Id.*, at 1231 (J.A. 490-91).

predominantly black neighborhoods.[17]

Respondents also put on the testimony of Gordon Foster, an expert in the areas of school administration and school desegregation planning and implementation. Dr. Foster presented an alternative desegregation plan that would modify the Finger Plan to alleviate the inequitable burdens on Afro-American school children and the Afro-American community while maintaining a fully desegregated system.[18]

F. The District Court's Order

On December 9, 1987, the district court issued its opinion and order dissolving the 1972 decree and relinquishing any further jurisdiction. 677 F. Supp. 1503 (W.D. Okla. 1987). With regard to the question of residential segregation, the court acknowledged the evidence

[17] *Id.*, at 1231-1232; see also *id.*, at 1234-37 (J.A. 490-95).

[18] *Id.*, at 1278-1282 (J.A. 506-10).

that few if any white families would chose to move into the predominantly Afro-American inner city area, but did not mention Dr. Clark's testimony that this reluctance was linked to the creation of the ghetto by official action.[19] The court concluded that the school district had achieved "unitary" status and that therefore the 1972 decree should be dissolved.

The court of appeals reversed primarily on the ground that the petitioner had not made a sufficient showing of changed circumstances that would justify the dissolution of the injunction. The reversion of ten schools to the same total segregation that existed prior to the decree being implemented was inconsistent with a demonstration that "'the dangers the decree was meant to foreclose must almost have disappeared.'" 890 F.2d 1483, 1493 (10th Cir. 1989). The decision of the district court was reversed and the case

[19] 677 F. Supp. at 1512.

remanded for further proceedings. The petitioner sought review from this Court, and certiorari was granted on March, 26, 1990.

SUMMARY OF ARGUMENT

I.

A. School desegregation cases, as cases in equity, are governed by the same principles regarding dissolution or modification of permanent injunctions as are all other cases in equity. Since an injunction is directed to the future, a court in equity retains the inherent power to modify it to adapt to changed conditions. However, that power is governed by the principles enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932). Thus, a permanent injunction will not be revoked or modified unless changed circumstances have turned it into "an instrument of wrong." *Id.*, at 115. The mere fact that petitioner would prefer, or

would be better off, if the injunction were relaxed is not sufficient; there must be a "clear showing of grievous wrong evoked by new and unforseen conditions." *Id.*, at 119. No such showing has been made here. The decisions of this Court have made it clear that school desegregation cases are governed by generally applicable equitable principles (*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)), including the rule of *United States v. Swift & Co.* (*Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976)).

B. Even under a standard less exacting than that of *Swift*, petitioner has not shown sufficient justification for relief from the injunction. The reconsignment of 40% of the school system's Afro-American elementary school children to virtually all Afro-American schools is inconsistent with the principles enunciated in *Swann*. The reimposition of neighborhood schools on racially segregated housing caused by state action, including acts of the school district, has

resulted in a school system in which the vestiges of the prior segregated system manifestly have not been eliminated "root and branch"

II.

This case does not present the situation that existed in *Pasadena City Bd. of Educ. v. Spangler*, where a school system was required to readjust school boundary lines periodically in order to maintain "racial balance" in schools in the face of demographic changes in the community. To the contrary, here it was petitioner school board that unilaterally, without notice or permission, abandoned part of a school plan that had effectively and permanently achieved full integration, and returned to zones that recreated precisely the segregation that required the court-ordered plan to begin with. Whatever "unitariness" may mean, it cannot mean be that a school board may resurrect conditions of racial segregation that are beyond the power of a federal

court to remedy in the absence of a finding that the action was taken with invidious discriminatory motivation.

III.

Alternatively, if a finding of "unitariness" means that a school system may make changes in pupil assignments without court review in the absence of racially discriminatory motivation, such a finding must be based on a searching factual inquiry that establishes that *all* the circumstances and conditions that required the imposition of a desegregation decree have disappeared. Thus, there must be a determination that the system will remain unitary in the face of any change in pupil assignment procedures. Such an inquiry and such findings were not made in the present case, and at the least the case must be remanded to the court of appeals for a determination of the meaning of the various findings of "unitariness" made by the district court.

ARGUMENT

Introduction

In order to focus our argument, respondents first wish to point out what this case is *not* about:

1. This is not a "de facto" school case, where there had been a long-standing tradition of neighborhood schools that became racially isolated because of housing patterns unrelated to governmental actions. This is a classic *de jure* case involving a school district that had schools rigidly segregated by law and that adopted neighborhood schools only after *Brown I* and *Brown II*. Moreover, neighborhood schools were imposed on housing that was rigidly segregated as a result of state action, and the adoption of neighborhood schools increased and exacerbated this residential segregation.

2. This is not a "Spangler"[20] *case*, where a district court required the modification of a desegregation plan to accommodate shifting residential patterns that had led to some schools becoming racially unbalanced. Here, there was in place a plan that successfully and completely desegregated all the schools in the district.[21] The school district, without the approval of the district court, abandoned part of it and resegregated ten elementary schools.

3. This case does not involve a "small number of one-race schools" within the meaning of *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971). Forty per cent of Afro-American children in grades 1-4 attend ten schools that are nearly 100% Afro-American. At the same time, thirteen other elementary schools have become more

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[20] *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

[21] Thus, the schools serving grades 5-12 continue to follow the Finger Plan and remain desegregated. In addition, the faculties at all grade levels are currently fully integrated.

than 80% white because of the re-imposition of neighborhood schools.[22]

The sole issue in this case is whether the Oklahoma City school district can abandon an effective desegregation plan, relegate 40% of Afro-American elementary pupils to racially segregated schools, and take no other steps to overcome the vestiges of segregation. We urge that such a result is wholly inconsistent with the promise of *Brown I* and *II*, with the mandate of *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), and with the basic principles of equity applicable to school desegregation lawsuits under *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*.

[22] *Dowell v. Bd. of Education of Oklahoma City Public Schools*, 677 F. Supp. 1503, 1509-1510 (W.D. Okla. 1987).

I.

SCHOOL DESEGREGATION CASES ARE GOVERNED BY THE EQUITABLE PRINCIPLES ESTABLISHED BY *UNITED STATES v. SWIFT & CO.*

A. *United States v. Swift & Co.* Governs This Case.

It is established equity jurisprudence that a permanent injunction remains in effect and is subject to the court's enforcement and implementation at any time, unless and until it is dissolved pursuant to the procedure and under the standard specified by the familiar rule of *United States v. Swift & Co.*, 286 U.S. 106 (1932). *Swift* recognized that a court in equity retains the power to modify an injunction, which necessarily looks to the future, if the injunction "has been turned through changing circumstances into an instrument of wrong." 286 at 115.[23] It is not enough that

[23] The power exists "by force of principles inherent in the jurisdiction of the chancery." 286 U.S. at 114. As noted in 11 Wright & Miller, *Federal Practice and Procedure*, § 2961, p. 599, the authority "has its roots in the historic power of chancery to modify or vacate its decrees 'as events may shape the need.'" Lord Bacon's Ordinances, adopted in 1618, provided:

(continued...)

the defendants "be better off if the injunction is relaxed;" they must be "suffering hardship so extreme and unexpected as to justify [the court] in saying that they are the victims of oppression." *Id.*, at 119.

> Nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us to change what was decreed after years of litigation . . . .

Id., at 119. Central to that showing is a demonstration that the changes in circumstances "are so important that dangers, once substantial, *have become attenuated to a shadow.*" *Id.* (Emphasis added).

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[23](...continued)

> No decree shall be reversed, altered, or explained . . . but upon bill of review: and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree without farther examination of matters in fact, *or some new matter which hath risen in time after the decree*, and not any new proof which might have been used when the decree was made: . . . .

7 Bacon, *Works* 759 (Spedding ed. 1879)(emphasis added). Cases as early as 1545 permitted modification of an equitable decree on the basis of new matter. See Developments in the Law, *Injunctions*, 78 Harv. L. Rev. 994, 1080-1086 (1965) and Note, *Finality of Equity Decrees in the Light of Subsequent Events*, 59 Harv. L. Rev. 957-966 (1946).

The holding of *Swift* has been consistently reaffirmed by this Court,[24] and has been applied in a wide variety of circumstances and types of cases by the lower federal courts.[25] The applicability of *Swift* to school desegregation cases was explicitly recognized by this Court in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 437 (1976); that conclusion necessarily flowed from the holding in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*, that school desegregation cases are governed by the same standards as are all other cases that lie in equity. 402 U.S.

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[24] See, *e.g.*, *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 247-249 (1968)(*Swift* reaffirmed, held not to prevent modification of a decree on petition of *plaintiff* in order to achieve the purposes of the original decree rather than to nullify it); *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)(*Swift* reaffirmed, held that it was consistent with its principles to modify an injunction to make it consistent with an amendment to a statute that was the basis for the injunction's issuance). The decree in *Swift* itself survived another attempt to modify it in 1960 (*United States v. Swift & Co.*, 189 F. Supp. 885 (D.C. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961)), and was still in force more than 50 years after it was entered. *United States v. Armour & Co.*, 402 U.S. 673 (1971).

[25] See the cases discussed in 11 Wright & Miller, *Federal Practice and Procedure* § 2961 and in 7 Moore, *Moore's Federal Practice* ¶ 60.26[4].

at 15.

Thus, there is no place in school desegregation litigation for a "unitariness" finding that is based on a lesser standard than *Swift*'s and that thereby undoes the permanent character of the permanent injunction that the plaintiffs have won and to which they are entitled upon proof of a constitutional violation. In the present case the finding of "unitariness" in 1977, whatever that elusive term might have meant, left the permanent injunction in full effect and left the district court and the respondents with the expectation that it would be followed by the school district; indeed, the injunction *was* followed in every respect for eight years until it was unilaterally abandoned with regard to the elementary grades in 1984.[26]

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[26] It is because of these facts that the issue of whether respondents are "bound" by the 1977 finding of unitariness because they did not appeal the order is of absolutely no consequence. In short, there was nothing for respondents to appeal, since the order did not by its terms or effect in any way adversely affect their rights. The permanent injunction requiring the implementation of the Finger Plan remained in place and (continued...)

Under these principles, a "unitariness" finding is a convenient instrument for marking the point at which a district court gives up its former active supervision over pupil assignment procedures and other school board actions that affect the racial distribution of students among schools. Upon a finding that the school system has a "unitary" character, the court may properly permit the board to implement such actions henceforth without prior approval. But the board remains under a continuing obligation to maintain a school system from which segregation has been completely and permanently eliminated; and its actions

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[26](...continued)
the district court expressly stated in its order that it did not foresee any "dismantlement of the Plan." In fact there was none until 1984, when the school district abandoned the plan in part without any notice to the court or plaintiffs, and without filing a motion under Rule 60(b), F. R. Civ. Proc. seeking relief from the court's judgment through dissolution or modification of the permanent injunction. It was not until 1985, when the district court retroactively interpreted its 1977 order to mean that plaintiffs had no enforceable rights under the still undissolved permanent injunction, that there was any need or obligation to appeal; the plaintiffs did so and the court of appeals reversed the district court's order. The district court did not actually dissolve the permanent injunction until 1987. 677 F. Supp. at 1526.

remain subject to the court's review for consistency with that obligation.

Thus, once a state or subdivision of a state has been found, as have Oklahoma and the Oklahoma School Board, to have violated the Fourteenth Amendment by deliberately segregating Afro-American children from white children in the public schools, a permanent injunction promising a permanent correction of that constitutional violation is in order. The obligation of the board to conduct its affairs in such a way as to prevent resegregation and the power of the court to review the board's actions to assure that resegregation does not occur are coextensive with the permanent injunction. Of course, as here, the implementation of a fully corrective injunction can lead to the dismissal of the action *without* the dissolution of the

injunction.[27]

Under *Swift & Co.* a school district, like any other equity defendant, can be relieved from a permanent injunction under appropriate circumstances. But those circumstances must amount to a "clear showing of grievous wrong evoked by new and unforseen conditions," 286 U.S. at 119.[28] As the Tenth Circuit properly held, the Oklahoma City Board of Education made no such showing here. *First*, the underlying circumstances that required the terms of the injunction had not changed at all.[29] To the contrary, the

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[27] As noted at n. 24, *supra*, the injunction in *Swift* itself was still in effect in 1971. It is our understanding that there are similarly outstanding permanent injunctions in a large number of anti-trust cases brought by the United States going back to the passage of the Sherman Anti-Trust Act; in the majority of these cases the action has been dismissed, but the injunction remains in force and is enforceable.

[28] The alternative basis for relief from an injunction, a change in the substantive law that gave rise to the need for equitable relief (see *Pennsylvania v. Wheeling & B. Bridge Co.*, 59 U.S. 421 (1856); *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)), does not apply here.

[29] Thus, continuation of the injunction here as long as the underlying condition of residential segregation persists would "not extend [it] beyond the time required to remedy the effects of past intentional

(continued...)

facts demonstrated that returning to the same neighborhood schools as in 1971 meant the return to the same segregated schools.[30] Since the continuing existence of the Afro-American ghetto, which had been created by official action, was the result of antipathy of whites to moving into an area identified as minority, the vestiges of the prior segregated system remained. *Second*, the justifications advanced by the school board for abandoning the plan in grades 1-4 did not amount to "grievous wrong." Respondents agreed that the burdens on the Afro-American community had been inequitable and put forward alternative plans that would have corrected the inadequacies of the Finger Plan without

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[29](...continued)
discrimination." *Spangler v. Pasadena City Bd. of Ed.*, 611 F.2d 1239, 1245, n. 5 (9th Cir. 1979)(concurring opinion of then Judge Kennedy).

[30] It must be kept in mind that the effect of adopting neighborhood schools in 1955 "was to erect new boundary lines for the purpose of school attendance in a district where no such lines had previously existed, and where a dual school system had long flourished." *Wright v. Council of City of Emporia*, 407 U.S. 451, 460 (1972). Just as in *Wright* both the original adoption of neighborhood school attendance zones as well as their re-adoption in 1977 "must be judged according to whether it hinders or furthers the process of school desegregation." *Id.*

resegregating the schools. The district court held, however, that the respondents were precluded from obtaining any further remedial relief because of the so-called "unitary status" of the Oklahoma City schools, citing the fear of "white flight" if white students were bused and purported additional costs. 677 F.Supp. at 1525-26. In any event, even assuming respondents' plans were faulty in some respect, this in no way relieved the school board from coming forward with its own alternative plan that could both maintain desegregation while correcting any inequities.

B. The School Board Has Failed to Justify Resegregating Schools Under Even a Lesser Standard than *Swift*.

Even if the exacting *Swift & Co.* test were not the applicable standard, the school board has shown no sufficient justification for relief from the injunction that goes so far as to permit the consignment of 40% of Oklahoma City's Afro-

American elementary school children to virtually all-Afro-American schools. Any test for modifying a school desegregation decree must, at the least, be consistent with the general remedial principles announced in *Swann v. Charlotte-Mecklenburg Bd. of Educ., supra*. Under *Swann*, when substantially one-race schools persist or are re-introduced in a school system "with a history of segregation," the court that decreed injunctive relief is required to "scrutinize such schools, and the burden . . . [is] upon the school authorities to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26.

Here, the board neither did nor could meet that burden. The key question was whether the existing residential segregation that produced the ten all-Afro-American schools was linked to the residential segregation found by the district court to be caused by official actions, including the

imposition of a neighborhood school plan on existing residential segregation in 1955. As described above, in 1967 and 1972 the district court held that neighborhood schools could *not* be used precisely because they exacerbated housing segregation by destroying integrated neighborhoods. Nevertheless, the district court later held that its two "unitary" findings mean that, in a mere five to thirteen years, by 1977 or 1985, the effect of *all* governmental actions that contributed to residential segregation had become attenuated to the point that the school board could revert to precisely the same school zones that had helped to create the segregation in the first place.

Respondents urged below, and continue to urge here, that this finding was clearly erroneous because it failed to take into account all of the testimony of petitioner's expert

upon whose opinion the court based its finding.[31] As set out in the Statement above, on both direct and cross examination Dr. Clark testified that because of "preference" that included at least an element of racial prejudice, whites would not move into a neighborhood that was more than 25-30% Afro-American. Thus, although some Afro-American families had, in the period 1972-1985, moved out of the ghetto created and maintained by state action, whites had not moved in. As Dr. Clark acknowledged, the refusal of whites to move in and thereby integrate the all-Afro-American schools re-established in 1985 was linked in significant degree to the past discriminatory actions by state and local governments and by the school board when it adopted neighborhood schools in the first instance.[32] The

[31] The court of appeals agreed that the district court's finding was clearly erroneous since its review of the entire evidence left it with "'the definite and firm conviction that a mistake has been committed.'" 890 F.2d at 1504.

[32] See pp. 20-22, *supra*.

district court simply ignored this part of Dr. Clark's testimony when it made its findings. While, as the finder of fact, the district court was free to credit the testimony of petitioner's expert, it could not accept some of that testimony and disregard, without explanation, the rest of it, particularly when it was consistent with the testimony as a whole and corroborated by that of respondents' expert.

Further, the conclusion of the district court that the effects of the school district's past discriminatory actions had become "attenuated beyond a shadow" was wrong as a matter of law. In Oklahoma City there were sixty-five years of state imposed segregated schools and fifty years of state enforced residential segregation that was exacerbated by seventeen years of "neighborhood" schools. It would be totally contrary to the spirit and intent of *Green* and *Swann* to conclude that a school district can escape its affirmative obligations to eliminate all vestiges of discrimination by

complying with a court decree that produces integration for one generation of students.[33] To argue that the same ten schools that are now all-Afro-American as were in 1972 are not vestiges of segregation is to ignore *Swann*'s recognition that the drawing of zone lines and the placement of schools are "potent weapon[s] for creating or maintaining a state-segregated school system." 402 U.S. at 21. There is simply no evidence in this record that meets the school board's burden of demonstrating that the natural effects of its policies from statehood to 1972 have been dissipated. As *Swann* holds:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence

[33] It is similarly contrary to the holdings of *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972) and *United States v. Scotland Neck City Bd. of Ed.*, 407 U.S. 484 (1972) to hold that an action of a school board with a history of *de jure* segregation must have an invidious discriminatory motive in order to violate the affirmative duty to desegregate. Those decisions stand squarely for the proposition that if an action has the *effect* of hindering the process of desegregation then it must be enjoined. It cannot be denied that the action of petitioner here had precisely such an effect.

> the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

402 U.S. at 20-21. Precisely this occurred in Oklahoma City; the school board has done nothing to correct the underlying condition, which remains the most dramatic vestige of the dual system.

The district court sought to avoid this conclusion solely because some Afro-Americans had, as a consequence of federal, state, and local fair housing laws, been able to move into areas from which they had once been barred by law. But the fact that the proportion of Afro-Americans who live in the ghetto has declined because *some* residents were finally able to move out, in no way diminishes the fact that the ghetto, which was created by state and city law and intensified by acts of the school board, still exists because whites will not move into it.

To summarize, a school system that has operated state-mandated dual system segregated by race has a permanent and continuing obligation to take affirmative steps to either eliminate or neutralize the vestiges of that system. Once a violation has been shown, plaintiffs are entitled to a permanent injunction requiring such affirmative action. An injunction may be dissolved only upon the showing required by *Swift* or, in the alternative, by a showing that all vestiges have been fully eliminated so that an injunction is no longer necessary. The only consequence of a finding of "unitariness" consistent with this view is that a district court may relinquish active supervision of a school desegregation case subject to its being reopened if there is, as here, a deviation from the decree resulting in resegregation.

II.

ALTERNATIVELY, A FINDING OF UNITARINESS MAY TERMINATE THE OBLIGATION TO ADJUST PUPIL ASSIGNMENT PLANS TO ACCOUNT FOR DEMOGRAPHIC SHIFTS

If the Court decides to approve the procedure of making findings of "unitariness" that have more than the limited consequences we have urged above, then the appropriate effect of a finding of "unitariness" can be nothing more than to terminate the school board's and court's obligation to adjust pupil assignment plans from time to time. A "unitariness" finding cannot properly be treated as licensing the school board unilaterally to abrogate the plan that produced "unitariness" and to restore the *status quo ante*.

As noted above, this case does not involve a situation in which, after a school system has been found "unitary," subsequent demographic shifts create a new condition of racial isolation in the public schools, and the federal court

that oversaw desegregation is asked to order additional remedial measures to correct this new condition. That is the situation that was explicitly described in *Swann* when the Court said that at a certain point in a school desegregation case:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

402 U.S. at 31-32.[34] See also *Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424, 435-36 (1976). The Tenth Circuit took the view that in the situation contemplated by

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[34] The Court went on:

> This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id., at 32.

Swann and *Spangler* no further judicial relief would be warranted, saying "a federal district court should not [thus] attempt an interminable supervision over the affairs of a school district." 890 F.2d at 1492 n. 17. For the purposes of the present argument II, we accept that premise.

In light of the premise, this case involves a situation that is the precise opposite of that contemplated by *Swann*. Here the school board is not seeking to retain a pupil assignment plan that produced an acceptable level of desegregation in the first instance and is later challenged as inadequate by litigants asking the court to "update" the plan to keep abreast of the latest population shifts.[35] To the contrary, here the school board itself acted unilaterally to *reverse* the pupil assignment plan that had made the system

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[35] Respondents put forward two proposed modifications of the Finger Plan only in response to the school board's action. Their purpose was to demonstrate that there were feasible means of maintaining desegregation in all of the elementary schools while meeting the ostensible reasons for reintroducing neighborhood schools in grades 1-4.

unitary; it *reinstated* geographic attendance zones that had been previously found by the district court to perpetuate and exacerbate racial segregation; and it thereby *restored* precisely the same pattern of racial separation in the schools that had existed before the unitariness finding was made.

As the court of appeals pointed out, "[i]t is uncontested that the contents of the [board's new] plan are contrary to the explicit dictates of the injunction" that produced desegregation (890 F.2d at 1492-93); and the new plan "has the effect of reviving those conditions that necessitated a remedy in the first instance" (890 F.2d at 1499). Specifically, the restoration of the previous geographic zoning scheme re-created virtually all-Afro-American student bodies in ten elementary schools that had been found to be identifiably Afro-American in 1972. Concomitantly, 13 schools that had student bodies 99.5% to 100% white in 1971-1972 had student bodies from 80% to 86.2% white in

1985-86, in a school district that is only 50.7% white.[36]

A finding of "unitariness" at the least supposes that a school board will continue to keep faith with the foundations of the finding. It does not empower the board to topple those foundations, resurrect conditions of racial segregation, and then insist that the conditions are beyond judicial correction unless the board is proven to have acted with an invidious discriminatory motivation in turning the clock back. Such a result is wholly inconsistent with the mandate of *Green v. School Board of New Kent County*, 391 U.S. 430, 438 (1968) that *all* vestiges of the prior segregated system be eliminated "root and branch," as well as the holdings of *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), and *United States v. Scotland Neck City Bd. of*

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[36] The thirteen schools are Adams, Buchanan, Coolidge, Fillmore, Hays, Hillcrest, Kaiser, Lafayette, Linwood, Prairie Queen, Quail Creek, Rancho, and Ridgeview. Compare the tables at 338 F. Supp. at 1260, showing the 1971-72 enrollments, and at 677 F. Supp. at 1509-10, showing the 1985-86 enrollments.

Educ., 407 U.S. 484 (1972), that actions by a school system that is under the duty to desegregate must be judged by their effect, rather than by their purpose.

III.

ALTERNATIVELY, A SYSTEM CAN BE "UNITARY" ONLY UPON A FINDING THAT IT WILL REMAIN SO IN THE FACE OF *ANY* CHANGES IN PUPIL ASSIGNMENT POLICIES

Petitioner takes the position that a finding of "unitariness" should be given the effect of forbidding district courts to review and correct school board actions that re-introduce conditions of racial isolation except upon a showing of a new constitutional violation committed with racially discriminatory motivation. This position, however, is fundamentally at odds with the holdings of *Wright v. Council of City of Emporia*, *supra*, and *United States v. Scotland Neck City Bd. of Educ.*, *supra*, unless the finding has been entered on the basis of underlying factual findings

that the system will remain unitary in the face of *any* non-invidiously motivated change in pupil assignment procedures that the board may subsequently adopt, including immediate reversion to the *status quo ante*.

The logic under which the petitioner and the district court argue that the 1977 "unitariness" finding authorized the board to abandon the pupil assignment plan that had made the school district "unitary" and to regress to an earlier neighborhood attendance zone scheme -- namely, that after a finding of "unitariness' a school board is free to do whatever it wants in the way of pupil assignment so long as it is not shown to be acting with a segregative purpose -- would equally justify the same regressive action by a school board on the first day after a unitariness finding is entered.

But if this is to be the *consequence* of a unitariness finding, then the *meaning* of a unitariness finding must fit the consequence. The meaning must be that a school system

has become sufficiently stabilized as a unitary one that it will remain unitary even on the supposition that the school board reverts, the very next day, to the identical geographic zones that previously had to be abolished to achieve desegregation. For example, if the "unitary" finding in this case had been based on underlying findings that over the years the Afro-American ghetto had been substantially integrated and that the Afro-American population was distributed throughout the school district, such a finding would permit the school district to re-adopt the earlier geographic zones since the system would remain "unitary."

Thus, at a *minimum* the district court must conduct a searching inquiry into the status of the system overall and make findings as to each of the factors identified in *Green v. New Kent County School Bd.*, 391 U.S. at 435, *Swann*, 402 U.S. at 18-21, and *Milliken v. Bradley*, 433 U.S. 267 (1977) as indicia that the vestiges of the prior system have been

removed and not simply neutralized by the desegregation plan. As *Green* admonishes (391 U.S. at 439), such an inquiry and findings must be specific to the case and not simply be a declaration of "unitariness" in the abstract.[37] Thus, a predicate is a hearing at which the parties and the court would investigate in detail whether *all* the circumstances that led to the entry of the order in the first place had been dissipated in fact. The burden would at all times be on the school district to demonstrate that none of the conditions that were indicia of a dual system remained.

Of course, given the facts in this case the 1977 "unitariness" finding could not and did not meet these standards. The district court itself, both through its questions at the 1975 hearing and its statement when it

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[37] As noted in the Brief *Amici Curiae* of the Council of the Great City Schools, *et al.*, at pages 13- 15, the inquiry must include a determination that the school district has fully complied with all outstanding court orders and has demonstrated its good faith commitment to carrying out its constitutional obligations.

terminated the case in 1977, expressed the clear expectation that the school board would *not* revert to the same zones if the system were found to be unitary and the case dismissed. Even after eight years, however, when the board did go back to the same zones the result was to recreate the same segregated schools that the plan was instituted to abolish since the state-created ghetto that required the entry of the plan was still in existence. Thus, it is impossible to conclude that all vestiges of the prior *de jure* segregated system had been eliminated "root and branch."

Therefore, this Court should conclude that the district court's unitariness finding was not based on a sufficient factual predicate and affirm the decision of the Tenth Circuit. At the least, the case must be sent back to the Tenth Circuit to determine the meaning of the various "unitariness" findings made by the district court and review them under the legal standard set out in this Part III.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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No. 89-1080

In The

Supreme Court Of The United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

vs.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

The central issue now before this Court was aptly framed by the Ninth Circuit in a closely analogous case decided over a decade ago: "'If not now, and on this showing, when, and on what showing,' will the governance of the school system be restored to the elected officials who are charged with that governance under state law?" *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1240 (9th Cir. 1979). Respondents' answer to this question is direct: not in the foreseeable future, and perhaps never.

According to Respondents, the district court in this case is obliged to retain its remedial jurisdiction — and to enforce the school district's continued compliance with a comprehensive system of race-based student assignments and cross-town busing — until such time as the neighborhoods of Oklahoma City are fully integrated. Respondents make no claim that the desegregation decree entered by the

district court (and designed by Plaintiffs themselves) was either intended to remedy or capable of remedying residential segregation, and they offer no suggestions as to how either the district court or the school board could desegregate the City's neighborhoods. To the contrary, Respondents admit that the school district's predominantly black northeast quadrant (the "Afro-American ghetto,"[1] as Respondents put it) is all-black simply "because whites will not move into it" — a phenomenon over which the district court and the school district have absolutely no control. Resp. Br. 47. Nonetheless, according to Respondents, the district court will not be relieved of its responsibility to superintend the operations of the school system until whites move into and fully integrate the "ghetto." Thus, the ultimate responsibility for establishing a unitary school system rests not on the school board, but on white residents of Oklahoma City.

If Respondents' startling submission is correct, no major formerly *de jure* segregated school system in the country can hope to achieve unitary status in the foreseeable future, however long it may have labored in good faith to fulfill the requirements of a comprehensive school desegregation decree. We defy Respondents to cite one. Respondents' contention is not supported — indeed, is refuted — by this Court's decisions.

ARGUMENT

Respondents advance three basic arguments. First, they argue that the school board's constitutional violation entitled them to a permanent injunction requiring "the board to conduct its affairs in such a way as to prevent resegregation." Resp. Br. at 38. Such an injunction may be modified or dissolved, according to Respondents, only upon the showing required by *United States v. Swift & Co.*, 286 U.S. 106 (1932) — that the injunction "had been turned through changing circumstances into an instrument of wrong." *Id.* at 115. This showing cannot be made in the face of continued residential segregation, which Respondents contend is a lingering vestige of the prior dual system.

[1] The school district's northeast quadrant is certainly no "ghetto." *Dowell v. Board of Education of Oklahoma City Public Schools*, 677 F. Supp. 1503, 1511 n.4 (W.D. Okl. 1987).

Second, Respondents argue that a finding of "unitariness," even if properly entered here by the district court, does not authorize the school district to adopt a neighborhood elementary school policy if it results in the re-establishment of virtually all-black student bodies in ten elementary schools that were identifiably black when the decree was entered in 1972. Such a result, according to Respondents, would be inconsistent with this Court's decisions holding that actions by a school system that is under a duty to desegregate must be judged by their effect, rather than by their purpose.

Finally, Respondents contend that a school system cannot achieve unitary status unless the system will remain racially balanced "in the face of *any* non-invidiously motivated change in pupil assignment procedures that the board may subsequently adopt," including a neighborhood school policy. Resp. Br. at 55. In this case, therefore, the Oklahoma City Public School System could properly be found unitary only if "over the years the Afro-American ghetto had been substantially integrated and . . . the Afro-American population was distributed throughout the school district . . . ." Resp. Br. at 56.

Thus, each of Respondents' arguments reduces to a single point: that residential integration is a prerequisite to dissolution of a school desegregation decree. As we demonstrate below, however, Respondents' arguments are without merit, including their threshold claim that the district court's 1977 unitariness finding had no binding effect on them.

I. THE DISTRICT COURT'S 1977 FINDING OF UNITARINESS IS PRECLUSIVE UNDER THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL

Certiorari was granted in this case to resolve, *inter alia*, a conflict among the circuits on the significance of a finding that a school district has achieved "unitary" status. Of the circuits which have addressed this issue, only the Tenth Circuit has concluded that a finding of unitariness in itself does not entitle a school district to be released from a desegregation decree. *Dowell v. Board of Education of Oklahoma City Public Schools*, 890 F.2d 1483, 1492 (10th Cir. 1989); *contra*, *Riddick v. School Board of City of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 419 U.S. 938 (1986); *United States v. Overton*, 834 F.2d

1171 (5th Cir. 1987). Respondents and their *amici* step away from this issue and, to support their argument that the decree should not be dissolved, now suggest the finding of unitariness entered by the district court in its 1977 order was not a veritable "unitary" declaration.[2]

The record in this case demonstrates without question that the district court's 1977 order was a true declaration of unitariness which signified that disestablishment of the dual school system was complete, and that the vestiges of unlawful discrimination in Oklahoma City had been eliminated. As a preliminary matter, it is important to remember that the district court's 1977 order was *not* appealed and became final. A *final* order must be interpreted in light of the other opinions, findings, and conclusions in the case. *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 295 (1943). Two particular opinions handed down in this case prior to the entry of the 1977 finding of unitariness reveal there was no confusion about the district court's intent to retain jurisdiction until the dual school system in Oklahoma City had been completely disestablished.

A decade before the district was found unitary and jurisdiction was relinquished, the Tenth Circuit instructed the district court to retain jurisdiction "until such time as the court [was] satisfied that the decreed unconstitutional practices [were] eliminated and appellant board [was] found to be in full compliance with the teachings of the *Brown* case." *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F.2d 158, 168 (10th Cir. 1967). Further, in 1972 when the district court ordered the school board to implement the Finger Plan, it candidly acknowledged that in light of the intervening decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it had prematurely closed the case for a short period during

[2] The court of appeals, on the other hand, never questioned the validity of the unitary finding entered in 1977. Rather, it concluded, as did the district court, that the 1977 finding of "unitariness . . . became final, and . . . [was] binding upon the parties." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). Therefore, when the court of appeals held "a finding of unitariness [does not] mandate the later dissolution of the decree with proof of substantial change in circumstances which led to the issuance of that decree," *Dowell v. Board of Education of Oklahoma City Public Schools*, 890 F.2d 1483, 1492 (10th Cir. 1989), it recognized that the Oklahoma City school system had achieved unitary status. The court of appeals thus correctly held the 1977 unitary finding preclusive, but incorrectly ruled on its effect.

the 1970-71 school year. *Dowell v. Board of Education of Oklahoma City Pubiic Schools*, 338 F. Supp. 1256, 1258 n. 1 (W.D. Okl. 1972). However, the court made clear that it would from that point forward "retain jurisdiction and evaluate the plan in practice and to see that state-imposed segregation was completely removed." *Id.*

Also, there was no doubt that unitary status was the ultimate goal of implementing the Finger Plan. In 1972 when the court ordered the implementation of the Finger Plan, it recognized that "[p]laintiffs [were] entitled to a decree requiring the reasonably immediate conversion of the Oklahoma City Public Schools into a unitary school system," and ruled that "[t]he defendant school board ha[d] an affirmative duty to convert to a unitary school system in which racial discrimination would be eliminated root and branch." *Id.*, at 1272. Moreover, the court found "[t]he [Finger] Plan would, if adopted and implemented in good faith, create a unitary system." *Id.*, at 1271.

Therefore, when the school board in 1975 filed its Motion to Close Case alleging that it "[h]ad eliminated all vestiges of state--imposed racial discrimination . . ., and [was] operating a unitary school system" (J.A., vol. I, 30), there was no confusion about the import of the question the board had placed at issue.

Plaintiff's counsel promptly submitted a letter to Judge Bohanon and filed a brief arduously opposing the board's motion. In the letter counsel asserted "that not all roots and branches of discrimination in the system [had] been eliminated." J.A., vol. I, 33. In the brief, counsel argued the case could not be dismissed until "disestablishment had been achieved" nor until "racial discrimination through official action [w]as eliminated from the school system." J.A., vol. I, 34-35, citing *Swann* at 32. "[T]hat hoped for status ha[d] not yet been reached," counsel stated. J.A., vol. I, 34-35. Thus, counsel argued that the court "must retain jurisdiction." J.A., vol. I, 36.

After the school board and the Bi-Racial Committee filed reports with the court concerning the state of desegregation in the schools (J.A., vol. I, 23), the court set the Motion to Close Case down for an evidentiary hearing. When the hearing opened on the morning of November 11, 1975, Judge Bohanon reminded the parties that "a duty [was] imposed upon the court under the Constitution to require the

school board to desegregate a dual school system and to complete a unitary school system." J.A., vol. I, 40.

During opening statements, counsel for the board reiterated the court had "a duty to close [the] case if the system ha[d] achieved unification." J.A., vol. I, 43. In response, counsel for the plaintiffs stated: "[O]ur position is that the test of whether or not the Court can relinquish jurisdiction is whether or not all *vestiges of segregation* or racial discrimination have been eliminated." J.A., vol. I, 44-45 (emphasis added).

The court received extensive testimony and evidence from both parties on the question whether the Oklahoma City School Board had eliminated the vestiges of unlawful segregation and had achieved unitary status. J.A., vol. I, 46-173. Following the evidentiary hearing, the school board and Bi-Racial Committee continued to file required reports with the court. J.A., vol. I, 23.

On January 18, 1977, more than a year after the evidentiary hearing on the board's Motion to Close Case, Judge Bohanon entered the "Order Terminating Case." J.A., vol. I, 174. In the order the court found the Finger Plan "was indeed a plan that worked and that substantial compliance with constitutional requirements ha[d] been achieved." J.A., vol. I, 174. The court found that a "unitary system" had been "slowly and painfully accomplished over the sixteen years during which the cause ha[d] been pending." J.A., vol. I, 175. "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races," the court said, "the board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of the court." J.A., vol. I, 175. The "Order Terminating [the] Case" dissolved the Bi-Racial Committee and "terminated" all further "jurisdiction" in the case. J.A., vol. I, 175-176.

The record therefore confirms that the district court found unitary status had been achieved only after a careful hearing and review of all aspects of the board's operations to ensure that all vestiges of prior discrimination had been eliminated and that the dual school system had been completely dismantled. The court's statement in the 1977 order, that it "d[id] not foresee that the termination of its jurisdiction w[ould] result in dismantlement of the plan" (J.A., vol. I,

174-175), was simply an observation made in light of testimony at the hearing that the board at that time did not intend to alter its busing program. J.A., vol. I, 103-104. The court certainly did not *order* the board to continue to implement the plan, and obviously did not foresee the plan would be followed indefinitely. Indeed, the order released the board "to pursue in good faith its legitimate policies without the continuing constitutional supervision of th[e] Court."[3]

We are at a loss to understand how Respondents can now argue that the issue whether they "are 'bound' by the 1977 finding of unitariness because they did not appeal the order is of absolutely no consequence . . . [since] . . . the order did not . . . adversely affect their rights." Resp. Br. at 36 n.26. Fifteen years ago they knew the court's ruling adversely affected their rights. They steadfastly opposed the board's Motion to Close Case, arguing jurisdiction could not be terminated because all "vestiges of segregation" had not been eliminated. Irrespective of the reasons Respondents chose not to appeal the 1977 order, the fact remains it became *final*. Respondents are therefore precluded from collaterally attacking[4] that order by virtue of the doctrines of *res judicata* and collateral estoppel.

In *Allen v. McCurry*, 449 U.S. 90, 97 (1980), the Court recognized that a case in the nature of a suit in equity "presents no categorical bar to the application of *res judicata* and collateral estoppel concepts." The doctrine both promotes fairness by ensuring that the parties who have had a full opportunity to litigate an issue are bound

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[3] Further, the court's statement is not inconsistent with a finding of unitariness and its accompanying devolution of control to the school district. The word "foresee" in fact implies that discretion regarding continuation of the decree was being returned to the school district, as the word implies speculation as to how the school district will exercise its restored authority. Moreover, this is the only interpretation consistent with Judge Bohanon's opinions in 1985 and 1987, in which he expressed no surprise regarding the school board's change in the busing plan, and in fact upheld it as a valid exercise of the authority returned to the board in the 1977 order. Those opinions indicate that what the Judge foresaw in his 1977 order was exactly what the school board did – maintain the tenets of the plan in effect for a number years until demographic changes rendered the plan oppressive at the elementary grade level.

[4] *See* Resp. Br. at 57 ("Given the facts in this case the 1977 'unitariness' finding could not and did not meet these standards."); *id.* at 58 ("the district court's unitariness finding was not based on a sufficient factual predicate").

by the result, and conserves judicial resources by decreeing an end to litigation.

This Court has adopted a policy of "rigorous application of *res judicata*." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 400 (1981).[5] Consequently, in 1985 when Respondents sought to collaterally attack the unitary finding in their challenge to the grades 1-4 neighborhood school plan, the district court found it preclusive:

> [T]his court's finding in 1977 that a *unitary system* had been achieved by the Oklahoma City Public Schools is *res judicata* as to those who were then parties to this action . . . . There's been no showing in this case that the original Plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present [Respondents] are, therefore, *collaterally estopped* from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977.

Dowell, 606 F. Supp. 1548, 1555 (W.D. Okl. 1985) (emphasis added). The court of appeals absolutely agreed: "When . . . the [district] court determined that the implementation of the Finger Plan had resulted in *unitariness* within the district, that finding became *final*, and it, too, is *binding* upon the parties with equal force." *Dowell*, 795 F.2d 1516, 1522 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986) (emphasis added). Accordingly, it is the *law of this case* that the Oklahoma City School District achieved unitary status in 1977. The uncompromising principles of *res judicata* and collateral estoppel preclude any attempt to evade that finding in these proceedings.

In addition, contrary to the suggestion of *amicus* United States (Br. at 21-22), there is no need to remand this case to the Tenth Circuit for a determination of the district court's intent with respect to its unitary finding. Here, the district court has twice interpreted its own 1977 order. In 1985 the court stated:

[5] Consistent with this concept, a number of lower courts have applied the principles of collateral estoppel or issue preclusion to school desegregation cases. *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1985); *Bronson v. Board of Education of City School Dist.*, 687 F.2d 836 (6th Cir. 1982). Indeed, the Fourth Circuit has held that these principles apply to a final declaration of unitary status. *Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 531 (4th Cir.), *cert. denied*, 419 U.S. 938 (1986).

> At the time [the] court totally relinquished its jurisdiction over [the] case in 1977, the court was convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the school district had achieved the goal of being a desegregated non-racially operated and unitary school system.

Dowell, 606 F. Supp. at 1554. In 1987, the court again confirmed that unitary status had been achieved in 1977:

> This court fully intended in 1977 to restore the school board to total independence and relinquish to the board all control over the school district . . . because the Oklahoma City Schools were at that time, as they are today, operating a unitary system, wholly without discrimination to blacks or other minority students, faculty or staff.

Dowell, 677 F. Supp. at 1506.[6]

In desegregation cases, this Court has recognized the need to defer to the district court's on-the-spot knowledge of local conditions at the time it acted. *Swann*, 402 U.S. at 28. Consequently, the district court is "best able to interpret its own orders." *Vaughns v. Board of Education of Prince George's County*, 758 F.2d 983 (4th Cir. 1985); *United States v. Board of Education of Chicago*, 717 F.2d 378, 382 (7th Cir. 1983).[7]

In sum, the question presented for resolution is not the validity of the unitary finding, but rather its effect. For the reasons stated in our opening brief, the Tenth Circuit erred when it concluded that the district court's binding declaration of unitariness did not entitle the school district to be released from the desegregation decree.

[6] Just as important, the district court found in 1985 and again in 1987 that the school district had maintained unitary status from 1977 to date. *Dowell*, 606 F. Supp. at 1555; *Dowell*, 677 F. Supp. at 1515-1519.

[7] A remand to the Tenth Circuit for a determination of whether Judge Bohanon in fact declared the district unitary in 1977 would make no sense. The Tenth Circuit would certainly have no basis for ruling that what Judge Bohanon said he meant in the order, and in two subsequent rulings, was not what he meant. Moreover, the Tenth Circuit, as noted above, has already answered this question, stating that Judge Bohanon indeed entered a "binding" declaration that the school district was unitary in 1977.

II. THE *SWIFT* STANDARD DOES NOT APPLY TO A SCHOOL DESEGREGATION BUSING DECREE

Relying on *Swift*, Respondents argue (Resp. Br. at 33-34), and the majority below held (Pet. App. at 11a-12a), that a school desegregation decree cannot be dissolved or modified without "a clear showing of grievous wrong evoked by new and unforeseen conditions . . . ." 286 U.S. at 119. An injunction, to qualify for modification under *Swift*, must cause defendants "hardship so extreme and unexpected as to justify [the court] in saying that they are the victims of oppression." *Id. Swift* involved an injunction prohibiting private meatpackers from engaging in various monopolistic practices. The standard in *Swift* is appropriate for *proscriptive* injunctions that impose a ban *intended to be permanent* on certain actions found unlawful or dangerous. It makes sense to continue such a ban indefinitely, absent exceptional circumstances compelling modification. Applying the *Swift* standard, however, in the entirely different context of a school desegregation remedy wholly misapprehends the *prescriptive* nature of such a remedy and fails to recognize that "the ultimate objective of the remedy is to make whole the victims of unlawful conduct." *Milliken v. Bradley*, 433 U.S. 267, 280 n.15 (1977) (*Milliken II*).

This Court's decisions have consistently stressed, particularly in the school desegregation area, that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . ." *Milliken II*, 433 U.S. at 282; *accord id.* at 286 n.17 ("[I]t must always be shown that the constitutional violation caused the condition for which remedial programs are mandated.").

These "fundamental limitations on the remedial powers of federal courts," *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982), were applied in a school desegregation context in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*). There, the lower courts had found that various acts by the Detroit Board of Education and state officials had created and perpetuated racial segregation within the Detroit school district. The remedy, however, had been extended to 53 of the 85 suburban school districts surrounding Detroit on the theory that "any less comprehensive a

solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems . . . ." *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973). This Court reversed, holding that the proposed multi-district remedy went beyond the constitutional violation because there had been no demonstration that the unconstitutional acts committed by officials of the Detroit school system had caused any significant racial segregation in the suburban school districts. As the Court noted (418 U.S. at 746) (emphasis added):

> [A desegregation] remedy is necessarily designed, as all remedies are, to *restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.* Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.[8]

Just as *Milliken I* makes clear the *geographic* make-whole limitations on judicial authority, this Court's decision in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), makes clear the *temporal* make-whole limitations on such authority: in neither instance may courts go beyond redressing the conditions caused by the identified violation. The district court in *Spangler* established in 1970 a system-wide student assignment plan designed to implement its order mandating that no school in the district have "a majority of any

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[8] These limitations on judicial remedies were reaffirmed in the school desegregation context in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*). In that case, the district court had ordered implementation of a comprehensive district-wide desegregation plan. Concluding that the evidence of constitutional violations failed to establish the necessity of a system-wide desegregation plan, this Court held that the lower court should have "tailor[ed] a remedy commensurate to the [Board's] . . . specific violations . . . ." *Id.* at 417. Accordingly, the case was remanded for formulation of a remedy precisely tailored to cure the board's violations, and no more. On remand, the lower courts were to "determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." *Id.* at 420, citing *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 213 (1973).

minority students." *Spangler*, 427 U.S. at 428-429. The school district achieved the racial percentages mandated by this order in the first year of the plan's implementation, but gradually "slipped out of compliance" (*id.* at 433) with the "no majority" requirement during ensuing years. In 1974, the school district unsuccessfully moved the district court to dissolve the "no majority" order, and the court of appeals affirmed. *Id.* at 431-432.

This Court vacated the court of appeals' judgment, identifying the essential question in the case as "the extent of a district court's authority in imposing a plan designed to achieve a unitary school system . . . ." *Id.* at 429. In concluding that the district court had exceeded its remedial authority in mandating certain racial percentages among students in Pasadena schools, the Court emphasized that the desegregation plan ordered by the district court was "designed to achieve a unitary school system" (*id.* at 429), and that "[t]here was . . . no showing . . . that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants." *Id.* at 435.[9] In summing up its conclusions, the Court stated (*id.* at 436-437) (emphasis in original):

> In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the [school board] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

The clear lesson of *Spangler* is that, once a constitutionally acceptable, properly tailored student assignment plan has been ordered by the court, full and faithful implementation of the plan remedies prior segregative pupil assignments. And when the constitutional violation has been remedied – that is, when the victims of the constitutional violation have been restored to the position they would have occupied in the absence of the violation – a federal court necessarily loses its authority to direct the operations of the school district. Decision-making power over the system must then be returned to local officials, governed once again by traditional equal protection standards, which prohibit only purposeful acts of discrimination.[10] *See* Pet. Br. at 15-18.

[9] In so holding, the Supreme Court applied to the Pasadena system the logic of *Swann*, 402 U.S. at 32-33; *see* Pet. Br. at 26.

Thus, the majority below plainly erred in pronouncing that "the condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing." Pet. App. 13a. Again, this principle is correct in the case of proscriptive injunctions, where mere compliance with a prohibition on wrongful conduct is no reason for altering the prohibition. But it makes no sense in the case of make-whole relief, where achieving a specific condition is the whole purpose of the injunction, and once that condition is achieved there is no longer any legal rationale for continuing the injunction.

Save for the majority below, every court of appeals to consider the question has grasped the distinction between proscriptive and make-whole relief and, instead of applying the *Swift* standard, has held that once the make-whole purpose of the decree is achieved, the school district is unitary and the decree must be lifted. *Spangler v. Pasadena*

[10] Contrary to Respondents' contention, *Spangler* did not "ma[k]e it clear" that "the rule of *United States v. Swift & Co.*" governs school desegregation cases. Resp. Br. at. 27, 35. *Spangler* cited *Swift* only as one authority for the broad proposition that, even before a school district succeeds in dismantling a discriminatory dual school system, changed circumstances may require modification of an injunctive decree which has become "final." 427 U.S. at 437. *Spangler* does *not* require a "clear showing of grievous wrong evoked by new and unforeseen conditions." *Swift*, 286 U.S. at 119; *compare* Resp. Br. at 26-27, 33-41. Similarly, *Swann* did not hold that "school desegregation cases are governed by the same standards as are all other cases that lie in equity," logically requiring application of the *Swift* standard. Resp. Br. at 35-36. In *Swann* this Court said that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." 402 U.S. at 15. *Swift* did not involve the denial of a constitutional right, and its exacting "standard" is not properly applicable here. *See* Pet. Br. at 33-37.

City Board of Education, 611 F.2d 1239 (9th Cir. 1979); *id.* at 1245 n.5 (Kennedy, J., concurring and criticizing use of the *Swift* standard for school desegregation decrees); *United States v. Overton*, 834 F.2d 1171, 1174-1177 (5th Cir. 1987) (expressly criticizing and rejecting the Tenth Circuit's opinion in *Dowell I*); *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987); *Riddick*, 784 F.2d at 534-539; *Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d 945 (11th Cir. 1989). Indeed, even a later panel of the Tenth Circuit has accepted this view. *Keyes v. School District No. 1*, 895 F.2d 659, 669 (1990). *See also Money Store, Inc. v. Harriscorp Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) (Posner, J., concurring) (explaining the inapplicability of the *Swift* standard to relief designed to reform public agencies).[11]

Swift therefore, does not establish the correct standard for determining whether a school desegregation decree may be terminated or modified. As established above, a school desegregation decree should be dissolved once a school district achieves unitary status. *See also* Pet. Br. at 25-33. The decision of the majority below consequently must be reversed.

III. THE SCHOOL DISTRICT IS NOT REQUIRED TO CONTINUE BUSING BECAUSE OF HOUSING SEGREGATION

Respondents assert that the residential segregation now making ten elementary schools in Oklahoma City almost all-black is not *de facto* but *de jure*. Respondents attribute this residential segregation to the school board on the theory that the board "increased and exacerbated" residential segregation by imposing neighborhood schools on state-imposed segregated housing from 1955 to 1972. Resp. Br. at 30, 42-45. The City's residentially segregated neighborhoods today are allegedly the natural effects of the school board's policies up to 1972. Resp. Br. at 46-47. Accordingly, Respondents claim the district court was "wrong as a matter of law" when it found that prior discrimination had become "attenuated beyond a shadow" by 1977. Resp. Br. at 45.

[11] Extension to the school desegregation context of the *Swift* standard for dissolving injunctive decrees also ignores both the right of the public school board to regain control and authority over the school district once past constitutional violations are corrected and the strong public interest in restoring such local control. *Milliken I*, 418 U.S. at 741-742; *Keyes*, 413 U.S. at 245-247 (1973) (Powell, J., dissenting); 20 U.S.C. § 1701(a)(2); Okla. Stat. Tit. 70, § 1210.20.

Respondents assert that the school board "has a permanent and continuing obligation to . . . eliminate or neutralize" the black "ghetto" (Resp. Br. at 48), which "remains the most dramatic vestige of the dual [school] system." Resp. Br. at 47.[12]

The short answer to Respondents' argument is that the Oklahoma City School District was correctly found unitary in 1977 under the standards established by this Court's decisions, particularly *Spangler* and *Swann*. As demonstrated previously, once a school district achieves unitary status, full decision-making authority is restored to the local school officials, whose conduct is governed once again by traditional equal protection standards. The school district may then depart from the desegregation plan as it chooses, unless such departures are motivated by discriminatory intent and consequently amount to a new constitutional violation. *Swann*, 402 U.S. at 32; *Washington v. Davis*, 426 U.S. 229 (1976); *see* Pet. Br. at 37-39. A policy of neighborhood schools does not of itself establish discriminatory intent or a constitutional violation, even when underlying housing segregation results in some segregation in the schools. *Swann*, 402 U.S. at 28; *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 537-538 n.15 (1982). Respondents have pointed to no possible new constitutional violation causing housing segregation since the unitariness declaration in 1977.

Moreover, the district court in this case found that the school board is not responsible for present housing segregation in Oklahoma City. Pet. App. at 176-186. Indeed, the court found that the policies of the school board since 1972 when the desegregation decree was implemented have reduced housing segregation in the City. *Id.* at 186. The record contains more than substantial evidence in support of these findings. Pet. Br. at 44-46, 48-50. Respondents' conclusory and unsupported[13] assertion that the system of neighborhood schools

[12] The black "ghetto" cannot be eliminated, Respondents admit, because whites will not move into it, however many blacks move out of it. Resp. Br. at 40, 44-45.

[13] Respondents report, without citation, that the district court "previously" found that the reinstated geographic attendance zones "perpetuate[d] and exacerbate[d] racial segregation." Resp. Br. at 52. The district court found in 1963 that the school board's minority-to-majority transfer plan was designed to perpetuate, encourage, and maintain segregation *in the public schools*. 219 F. Supp. 433, 441-42. It found in

Footnote continued on next page.

adopted in 1955 "intensified and exacerbated" *de jure* residential segregation in the City cannot suffice to make the express contrary findings of the district court clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564 (1985).[14]

To overcome the fact that the school board simply is not responsible for present residential segregation in Oklahoma City, Respondents argue, in essence, that this Court's decisions impose upon the school board an affirmative and permanent duty to desegregate the school system and that the school board cannot, consistent with that duty, adopt a neighborhood school policy until such time as the neighborhoods are integrated. According to Respondents, a school

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1965 that neighborhood schools superimposed over already existing residential segregation continued segregation *in the schools* because black students were then locked into black residential areas. 244 F. Supp. 971, 976. The district court did not find that the school board had caused residential segregation. To the contrary, it found in 1987 that the school board was not a cause of current residential segregation. Pet. App. at 15b-19b. Moreover, the district court also found that blacks are no longer "locked into" particular neighborhoods, and the transfer policy now in effect is majority-to-minority.

[14] The conclusion of the majority below is ambiguous. After stating that the question it was deciding was whether the district court correctly found that the currently challenged changes to the busing plan "maintained unitariness in student assignments," the majority states only that the district court "clearly erred in its findings of fact . . . ." Pet. App. at 40a-41a. In any event, the majority below surely did not apply the proper standard in determining whether the district court's findings of fact were clearly erroneous. Under the correct standard, "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574. The majority did not go through the record to determine whether the evidence permitted the district court's conclusions on various findings of fact. Instead, it pointed to "sharply contrasting views" or "conflicting evidence" in the record, discussed "divergent testimony," recalculated (erroneously) statistics offered by expert witnesses, countered some evidence and testimony by citing alternative evidence and testimony, sided with some experts in their methodology disputes with other experts, and noted that the district court "did not reference" or "did not address" certain conflicting evidence. Pet. App. at 23a-39a. In the end, the panel majority "total[ed] all of the evidence," and concluded that the district court "clearly erred in its findings of fact," despite its recognition that there was "evidence to facially support the district court's findings." Pet. App. at 40a-41a. In other words, the majority below clearly reweighed the evidence, contrary to the requirements for factual review on appeal. *See also* Pet. Br. at 44-50.

system cannot be found unitary so long as the City's neighborhoods are segregated. Alternatively, Respondents argue that "[t]he only consequence of a finding of 'unitariness' . . . is that a district court may relinquish active supervision of a school desegregation case subject to its being reopened if there is, as here, a deviation from the decree resulting in resegregation." Resp. Br. at 48. The very authorities on which Respondents rely in opposing the actions taken by the school board, however, authorize those very actions, absent proof of a discriminatory purpose.

First, Respondents are at pains to distinguish *Spangler*, which, for the reasons we have previously discussed (*supra*, at 11-13), is fatal to their position. Indeed, here the school board's case is far stronger than was that of the school board in *Spangler*. The Oklahoma City school system has been successfully desegregated for a generation of students, whereas in *Spangler* the school board successfully complied with the requirements of the desegregation decree in only the first year of its implementation and had not achieved a totally unitary system when it sought modification of the decree. 427 U.S. at 436. Nevertheless, this Court held in *Spangler* that the district court there lacked authority to require the school district to manipulate attendance zones to "ensure that the racial mix desired by the court [is] maintained in perpetuity." *Id. Spangler* thus makes clear that the Oklahoma City School Board cannot be required to manipulate attendance zones to ensure the desired racial mix is maintained in every school in perpetuity – especially after the school system has been unitary for a generation.[15]

Nor is Respondents' position supported by *Swann*. Under *Swann*, Respondents argue, a district court cannot terminate a desegregation decree until all "vestiges of the prior [dual school] system" – including in this case the black "ghetto" – "have been removed and not simply neutralized." Resp. Br. at 56-57. Since the

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[15] Justice Marshall's dissent in *Spangler*, joined by Justice Brennan, demonstrates how profoundly Respondents have misread that case. In Justice Marshall's view, the district court did have authority to require the school district in *Spangler* to adjust attendance zones "*until* . . . a unitary system is established." *Id.* at 443 (emphasis in the original). Justice Marshall expressly disapproved the district court's opinion that it could require continuous redistricting "even *after* the court has determined that its plan has been effectively implemented." *Id.* at 444 n.1 (Justice Marshall's emphasis).

"ghetto" persists, the school board must continue to neutralize its effects by busing.

In *Swann* this Court addressed the standards that must be met in establishing a satisfactory plan for dismantling a dual school system, *not* the standards that a once-dual school district must meet after it becomes unitary. *Swann* expressly viewed a court-ordered school desegregation plan as "an interim corrective measure" to be applied during an "interim period." 402 U.S. at 27-28. *Swann* recognized, moreover, that even during that interim period, the duty to disestablish a dual system "does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24. Only when the school board planned to retain one-race schools within the system during the "interim" transition period to unitary status did *Swann* require the school board to prove that such one-race schools were not the result of the board's present or past discrimination. *Id.* at 26-28. *Swann* nowhere prohibits the re-establishment of neighborhood schools *after* a unitary system has been established. To the contrary, *Swann* makes clear that judicial intervention in the student assignment policies of a school district that has achieved unitary status should be based only on proof that school authorities "deliberately" sought to bring about racial segregation. 402 U.S. at 31-32; Pet. Br. at 26. Moreover, *Swann* nowhere requires elimination of residentially segregated neighborhoods as a precondition for ending limited court control of schools.

Respondents principally rely on *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), and its companion case, *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972). *Wright*, however, does not stand for the the proposition that reinstituting neighborhood schools in 1985 "must be judged according to whether it hinders or furthers the process of school desegregation" — as Respondents assert. Resp. Br. at 40 n.30, 46 n.33. To the contrary, *Wright* underscores the point of *Spangler* and *Swann*: different standards apply to a school board that is attempting to dismantle a dual school system and to a school board that has successfully achieved a unitary system.[16]

[16] *Wright* and *Scotland Neck* do stand for the proposition that the actions of a school board *that has not yet dismantled its dual system* must be judged by their effect, not their purpose. Resp. Br. at 53-54.

Wright, like *Spangler* and *Swann*, involved the initial implementation of a desegregation plan aimed at establishing a unitary school system. This Court refused to permit the City of Emporia, within which were located both of the surrounding county's all-white schools, to create for itself a new independent school district after the county had been ordered to dismantle its dual school system. Emphasizing the narrowness of its ruling, the Court held "*only* that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." *Id.* at 470 (emphasis supplied). The district court's injunction did "*not* have the effect of locking [the city] into its present circumstances for all time." *Id.* (emphasis supplied). "Once the unitary system ha[d] been established and accepted" — as it has been here — the city might, "if it still desire[d] to do so, . . . establish an independent system." *Id.*

In sum, this Court's decisions make clear that the Oklahoma City School Board may now legitimately determine that the interests of all students in grades 1-4 will be best served by assigning them to schools in their own neighborhoods (while giving the parents of any students consequently assigned to a school in which their race is in the majority the option of sending their children instead to some other school).

Finally, we submit that residential segregation, even if caused in part by a past school board violation, should not of itself be sufficient to prevent a finding that unitariness has been achieved. This Court has never indicated that busing must continue until residential segregation has been eliminated.[17] School districts are only required to remove vestiges of segregation to the "greatest *possible* degree . . . taking into account the practicalities of the situation." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971) (emphasis added); *accord Swann*, 402 U.S. at 26. School districts do not have the power

[17] *Amici* National Association for the Advancement of Colored People and Citizen's Commission on Civil Rights, argue that the school board should be required to take affirmative action to counter housing segregation caused in part by its past violations, offering in addition to continued busing a number of possible residential incentives and development programs that could be provided by the school board and other local agencies. Br. at 11-16. But given the declaration of unitariness in 1977, there is no legal basis for imposing such mandates on the school board now. Even without the 1977 unitariness declaration, plaintiffs did not request such relief to counter housing segregation when the original desegregation decree was adopted in 1972, and there is no legal basis for adding such requirements now.

to control and remove housing segregation, and neither do the courts. To nevertheless compel busing until residential segregation disappears would impose a harsh burden on innocent school children for generations to come and would effectively displace local control of the schools for decades, if not in perpetuity. These burdensome effects should be considered among the "practicalities of the situation" in determining when a school desegregation decree should be lifted, and the elimination of residential segregation (whatever brought it about) should not be a prerequisite to achievement of unitary status.

CONCLUSION

For the foregoing reasons the decision of the Tenth Circuit Court of Appeals should be reversed, and the decision of the district court should be affirmed and reinstated in its entirety.

Respectfully submitted,

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OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, PETITIONER

v.

ROBERT L. DOWELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in reviewing a finding that the Oklahoma City public schools had achieved unitary status, the court of appeals erred in declining to terminate the ongoing desegregation decree.

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OCTOBER TERM, 1989

No. 89-1080

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, PETITIONER

v.

ROBERT L. DOWELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether a school district that has been found to be "unitary" is entitled to be released from a desegregation decree. The United States, which has responsibility for enforcing school desegregation under Titles IV, VI, and IX of the 1964 Civil Rights Act, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, is currently involved in approximately 500 school desegregation cases, many of which may be affected by the disposition of this case. For that reason, the United States participated as amicus curiae in both the district court and court of appeals in this case.

STATEMENT

A. The Racial Segregation Of The Oklahoma City Public Schools And The Imposition Of The Finger Plan

1. In 1961, black parents filed an action challenging racial segregation by the Oklahoma City public school system. The

case was assigned to Judge Luther Bohanon, of the United States District Court for the Western District of Oklahoma. In 1963, after extensive hearings on the issue, Judge Bohanon found that Oklahoma City had segregated its students by law, resulting in schools that were either all-white or all-black. 219 F. Supp. 427 (W.D. Okla. 1963). The court also found that the city's residential patterns were significantly segregated, in large part because of restrictive covenants and the enforcement of state and local laws mandating residential segregation. *Id.* at 433-434. See also 244 F. Supp. 971, 975-978 (W.D. Okla. 1965); 307 F. Supp. 583, 590-591 (W.D. Okla. 1970). The court found that, as a result of segregated housing practices, nearly all of the black population of the city lived in the "central east" area. 219 F. Supp. at 433-434.

In 1965, the court found that the School Board's attempt to desegregate through the use of neighborhood zoning had not succeeded. In particular, Judge Bohanon determined that the proposed neighborhood zones would maintain racially separate schools, given the extensive residential segregation in Oklahoma City. 244 F. Supp. at 975-978. As of the 1971-72 school year, the schools remained significantly segregated. While the overall racial balance of the district was 76.6% white and 23.4% black (338 F. Supp. 1256, 1259 (W.D. Okla. 1972)), 78% of the district's 114 schools were 90% or more one race (*id.* at 1260). Seventy-six of the 86 elementary schools were racially identifiable, with 16 nearly all-black and 60 all-white (*ibid.*).

2. In February 1972, Judge Bohanon ordered the School Board to implement a desegregation plan known as the Finger Plan, after the plan's author, Dr. John A. Finger. See 338 F. Supp. 1256. Under the Finger Plan, all of the majority-white elementary schools were reorganized to serve grades 1-4 of both races, while the majority-black schools became "fifth grade centers," which both black and white students would attend after completing fourth grade. To desegregate the elementary schools, black students would be bused from their neighborhoods to the former white schools for grades 1-4, and white students would be bused from their neighborhoods to the fifth grade centers. Kindergarten students would continue to attend

their present schools, but parents of kindergarteners would be permitted to send their children to the school of their choice. Middle schools (grades 6-8) and high schools (grades 9-12) would be desegregated through new attendance zones and feeder patterns. 606 F. Supp. 1548, 1552 (W.D. Okla. 1985).

Finally, the Finger Plan provided that elementary schools located in integrated neighborhoods (those with a racial balance within 15% of the district-wide balance) could operate as K-5, without busing obligations. Those schools were termed "stand alones." As new residential areas became integrated, students from those areas would be assigned to a neighborhood stand-alone school, and any student assigned to that school as part of the busing plan would be assigned elsewhere. 606 F. Supp. at 1552.

B. The District Court's 1977 and 1985 Unitariness Findings And The First Reversal By The Court Of Appeals

1. On June 2, 1975, after operating the Finger Plan for several years, the Board filed a "Motion to Close Case." The Board argued that it had "eliminated all vestiges of state-imposed racial discrimination in its school system and [was] * * * operating a unitary school system." 606 F. Supp. at 1551.

After receiving evidence concerning desegregation in the Oklahoma City public schools, Judge Bohanon granted the motion and issued an "Order Terminating Case." He found that the Board had "operated the Plan properly" and stated that he did "not foresee that the termination of * * * jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court." 606 F. Supp. at 1551. The court concluded that in view of the school district's unitary status, the Board was "entitled to pursue in good faith its legitimate policies without the continuing constitutional

supervision of this Court." *Ibid.* Accordingly, the court ordered the dissolution of the committee charged with implementing the 1972 decree and stated that "*[j]urisdiction* in this case is *terminated* ipso facto subject only to final disposition of any case now pending on appeal." *Ibid.* The plaintiffs did not appeal the Order Terminating Case.[1]

2. a. Notwithstanding the order declaring the district to be unitary and terminating the court's jurisdiction, the Board continued to implement the Finger Plan over the next eight years. 606 F. Supp. at 1551. By mid-1984, as more and more neighborhoods became integrated, an increasing number of elementary schools qualified for "stand alone" status. Two adverse implications of that otherwise favorable development were noted. First, since the stand-alone schools were located between the black residential area (in the central-east part of the district) and the more heavily white areas (on the outside areas of the district), the length of the bus rides for young black students in grades 1-4 to schools that were not yet stand alones would significantly increase. Second, the creation of more stand alone K-5 schools would disrupt the fifth-grade centers by reducing the available pool of fifth-grade children. *Id.* at 1552.

By virtue of the problems posed by the increasing number of stand-alones—and because of a perceived decline in parental and community support for the elementary schools—the Board decided on December 17, 1984, to adopt a Student Reassignment Plan (SRP) for the 1985-1986 school year. Under the SRP, a neighborhood assignment system would be implemented for grades K-4, thus eliminating busing for those grades. Busing would be retained, however, for the fifth grade centers, as well as for the middle schools and high schools. In addition, the Board approved a "majority to minority" transfer policy, under which any elementary school student could transfer from a school in which his race was in the majority to a school in which his race was in the minority. All faculties and staff were to remain integrated, and an "equity officer" would be engaged to ensure continued equality of facilities, equipment, supplies, books, and instructors in all schools. 606 F. Supp. at 1552.

[1] Over the next eight years, moreover, although minor modifications in the Finger Plan were adopted by the Board, the plaintiffs did not seek to revive or reopen the case. 606 F. Supp. at 1551.

b. On February 19, 1985, the respondents filed a Motion to Reopen the case, challenging the constitutionality of the SRP. They contended that the school system had not achieved unitary status, and that the new plan would create racially identifiable neighborhood schools.

On April 25, 1985, Judge Bohanon rejected that challenge and denied respondents' motion to reopen. 606 F. Supp. 1548 (W.D. Okla. 1985). He explained that in issuing the 1977 Order Terminating Case, the court had "totally relinquished its jurisdiction over this case," having been "convinced that the Finger Plan had been carried out in a constitutionally permissible fashion and that the School District had reached the goal of being a desegregated non-racially operated and unitary school system." *Id.* at 1554. In light of the 1977 order, the court added, respondents were "collaterally estopped from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977." *Id.* at 1555.

The court also found that the system had "remain[ed] unitary" as of 1985. 606 F. Supp. at 1555. In particular, the court observed, "[i]t has now been thirteen years since cross-town busing was introduced and almost twenty-five years since the start of desegregation litigation in Oklahoma City." *Ibid.* The court explained that "[t]he School Board, administration, faculty, support staff, and student body are integrated. Further, transportation, extracurricular activities and facilities within the school district are equal and nondiscriminatory." *Ibid.* Indeed, the court noted, "[a]t present, racial balance within 15 percentage points of the proportions in the system-wide student population is maintained in all classes in grades 1-12 through busing." *Id.* at 1553.

In light of its continued unitariness, Judge Bohanon held that the District was entitled to adopt the new SRP for grades K-4. "[O]nce a school system has become unitary," the court explained (606 F. Supp. at 1555-1556), "the task of a supervising

federal court is concluded." At that point, "district court intervention is normally not necessary unless there is a showing that the school district 'has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools.' " *Id.* at 1556. The court concluded that "[t]he Student Reassignment Plan was not created for the purpose of discriminating on the basis of race." *Ibid.* To the contrary, the court found, the new plan was adopted for "legitimate purposes: to protect against the loss of schools in the northeast quadrant of the district; to maintain fifth year centers throughout the district; to reduce the busing burden on young black students; to increase parental and community involvement in the schools; and to improve programs and provide elementary children with a greater opportunity for participation in extracurricular activities." *Id.* at 1553-1554. The court therefore upheld the SRP and denied the motion to reopen the case.

3. The court of appeals reversed. 795 F.2d 1516 (1986), cert. denied, 479 U.S. 938 (1987). The court first examined the 1977 order, concluding that "[n]othing in the 1977 order tempered the 1972 mandatory injunction." 795 F.2d at 1519. To the contrary, the court stated, the 1977 order indicated that "the court intended the 1972 order to retain its validity and prospective effect." *Ibid.* Moreover, the court held, the fact that the district court had declared the school district unitary did not mean that the decree had been lifted or that the Board was free to adopt a new plan. To be sure, the court observed, the 1977 unitariness finding "terminated active supervision over this case" and reflected that "the original purpose of the lawsuit had been achieved and that the parties had implemented a means for maintaining that goal." *Id.* at 1520. The court also acknowledged that the unappealed 1977 finding "was binding upon the parties." *Id.* at 1522. But because the district court had not "specifically dissolv[ed] its decree," the court of appeals held that the School Board was not relieved of its continuing "duty to persist in the elimination of the vestiges of segregation." *Id.* at 1520. The court stated that "[i]t is only when the order terminating active supervision also dissolves the mandatory injunction that the governing board regains total independence from the previous injunction." *Id.* at 1520-1521.

Having concluded that the School Board was still subject to the desegregation decree, the court next held that respondents were entitled to reopen the case to challenge the SRP. In assessing respondents' challenge, the court explained, the district court must not "lightly" permit a change in the underlying decree. "Having once determined the necessity to impose a remedy, the court should not allow any modification of that remedy unless the law or the underlying facts have so changed that the dangers prevented by the injunction 'have become attenuated to a shadow,' * * * and the changed circumstances have produced 'hardship so extreme and unexpected' as to make the decree oppressive.' " 795 F.2d at 1521, quoting *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). The court of appeals therefore remanded the case to the district court "to determine whether the original mandatory order will be enforced or whether and to what extent it should be modified." 795 F.2d at 1523. The court added that on remand the Board "must present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the order." *Ibid.*

C. The District Court's 1987 Unitariness Finding And The Second Reversal By The Court Of Appeals

1. Addressing the question posed by the court of appeals—"whether the School Board has shown a substantial change in conditions warranting dissolution or modification of the 1972 Order" (Pet. App. 5b)—the district court found that "over time, demographic change in Oklahoma City has rendered the 'stand-alone' feature in the Finger Plan inequitable and oppressive." *Id.* at 23b. The court reiterated that, without a change in the Plan, the growing number of stand alones would have "increase[d] the busing burden, in terms of time and distance, on young black children in grades 1-4" (*id.* at 21b), and would have "caused the student population at the fifth-year centers located in the east inner-city area to drop" (*ibid.*). Conversely,

the court found, the move to a neighborhood K-4 plan had increased parental and community involvement in the school system. *Id.* at 26b-27b.

The district court also found that the Board had taken "absolutely no action which has caused or contributed to the patterns of the residential segregation which presently exist in areas of Oklahoma City." Pet. App. 17b-18b. To the contrary, the court stated, "the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City." *Id.* at 18b. And the Board's continued, voluntary use of busing for grades 5-12, the court added, "cannot help but promote neighborhood integration and deter residential segregation in the future." *Ibid.*[2]

Finally, the district court found that the new K-4 plan had maintained the district's unitariness. The court noted that the neighborhood plan was adopted "without the intent to discriminate on the basis of race." Pet. App. 25b. Moreover, the court observed, although "many of the schools which were predominately black before the Finger plan was implemented are predominately black today because of the neighborhood plan," "discriminatory intent may not be inferred solely from the disproportionate impact of a particular measure upon one race." *Id.* at 28b-29b (emphasis omitted).[3] Taking all of the factors

[2] The evidence submitted to the trial court showed that since 1972, when the Finger Plan was first implemented, a significant number of black families had moved into areas throughout the school system; as a result, by 1980 there were no areas of the City that were more than 90% white. Def. Exhs. 1-4. Similarly, whereas prior to 1972 nearly 80% of black elementary schoolchildren had attended the black schools in the central east area (see Def. Exh. 36), by 1986—even after neighborhood zones had been restored for grades 1-4—only 40% of the black K-4 students attended the central east schools (Pltf. Exh. 27). And whereas in 1972 only 2.3% of the black children attended schools that were more than 95% white in the outer areas of the City (Def. Exh. 36), by 1986 fully 44% of the black children in grades K-4 were then attending those schools (Pltf. Exh. 27).

[3] The evidence before the trial court showed that under the new neighborhood school plan, there had been some resegregation of the school system. Whereas in 1986, the overall racial composition of the school district was 51%

together—including the composition of the student bodies, faculties and staff, and the community and administration attitudes toward the schools (*id.* at 29b)—the court found that "the Oklahoma City School District has remained unitary from 1977 to the present." *Id.* at 33b.[4]

Judge Bohanon then held that the decree he entered in 1972 should be dissolved. In making such a determination, Judge Bohanon explained, a court must "determine whether the 'purposes of the litigation,' as incorporated in the * * * decree, have been fully achieved." Pet. App. 35b. In the present case, the court stated, the purpose of the decree was "to dismantle the dual school system." *Id.* at 35b-36b. This objective, the court held, was achieved in 1977 when the District was declared unitary. *Id.* at 36b. "Moreover," the court added, "the school district's continued adherence to the fundamental tenets of the Finger Plan at all grade levels through the school year 1984-85 further insured that all vestiges of prior state-imposed segregation had been completely removed." *Id.* at 38b. The court concluded that "[u]ndoubtedly, after proper implementation for more than a decade, the dangers prevented by the 1972 decree have 'become attenuated to a shadow.' " *Ibid.* In short, "[w]hen the Oklahoma City School Board adopted its 1985 student assignment plan, it was unitary; and the purpose of this litigation had been fully achieved." And the achievement of uni-

white, 36% black, and 13% other (predominantly Hispanic), following the adoption of the SRP 11 of the 64 elementary schools had become more than 90% black. Def. Exh. 63; Pet. App. 11b-13b. Ten of those schools, moreover, were in the central east area and had been more than 90% black before implementation of the Finger Plan. Compare 338 F. Supp. at 1260 n.6 with Pltf. Exh. 27. On the other hand, less than half of the black children in grades 1-4 attended the 11 predominantly black schools, and none of the elementary schools with neighborhood zones were more than 90% white. Pltf. Exh. 27. The faculties of all the schools had also remained integrated. Def. Exh. 187.

[4] The evidence showed that from 1972 through 1984, through its operation of the Finger Plan, the Board had achieved and maintained in each public school a racial balance among students that was within 15% of the district-wide figures. Pltf. Exh. 13-25. In addition, the record showed that since 1970 faculties had been racially integrated. Def. Exh. 187.

tariness, the court concluded, "compels dissolving the 1972 decree." *Id.* at 39b.[5]

2. a. A divided court of appeals reversed (Pet. App. 1a-113a). Relying on *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), the court held that to secure a modification in a desegregation decree, a party must make " '[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions * * * to change what was decreed after years of litigation' " (Pet. App. 11a-12a). Because, in the court's view, " 'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate' " (*id.* at 13a), the court explained that "the party seeking relief from an injunctive decree 'must demonstrate dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor' " (*id.* at 12a). Moreover, the court added, mere "termination of the wrongdoing" (*id.* at 13a), or "compliance [with the injunction] alone" (*id.* at 14a), does not justify a change in the decree. That is so, the court asserted, because "[t]he condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree absent the *Swift* showing" (*id.* at 13a).

The court next held that the district court's 1977 unitariness finding did not entitle the School Board to be released from the decree "without proof of a substantial change in the circumstances which led to the issuance of the decree." Pet. App. 16a. The court explained that while a finding of unitariness vitiates "the court's need for active jurisdiction," it does not abate the court's "power to enforce its equitable remedy." *Id.* at

[5] Having found the school district to be unitary, the district court explained that future actions by the Board would be measured by traditional equal protection standards, and not under an effects standard as respondents had urged. The court stated that the "1977 unitary finding signifies that the Oklahoma City Board of Education had satisfied its affirmative duty to desegregate by eliminating the dual school system. Since the Board had dismantled the dual system at the time it adopted its neighborhood plan, effect does not govern over purpose as plaintiffs suggest." Pet. App. 41b.

17a n.17. Accordingly, the court stated, because the decree "remain[ed] in place" when the Board instituted the new K-4 plan, the Board had a "heavy burden" under this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), "to show that its implementation of the Plan does not 'serve to perpetuate or reestablish the dual school system.' " Pet. App. 19a. The court held that the Board had not carried its burden under *Swann*. Reviewing the evidence, the court found that under the SRP there was an "emergence of eleven all-black elementary schools." *Id.* at 26a. Moreover, the court stated, the increasing number of stand-alone schools did not constitute "a hardship" that was both "extreme and unexpected." *Id.* at 27a.

Finally, again applying the rule in *Swann* (see Pet. App. 31a), the court held that the new K-4 plan did not maintain the unitariness of the district. The court acknowledged that "population shifts in the District" had warranted some change in the Finger Plan. *Id.* at 30a. But it concluded that the district court had erred in finding the SRP a constitutional response to the changed conditions. According to the court of appeals, the district court had "[u]nfortunately" focused entirely on the question of "the Board's alleged discriminatory intent in adopting the Plan." *Ibid.* In the majority's view, the district court should instead have looked at whether the new plan accommodates "the ehanged circumstances" while at the same time "maintain[ing] the continuing prospective effect of the decree." *Ibid.* In view of "the emergence of one-race elementary schools" (*id.* at 32a), and what the court termed "the growing parity of imbalance between faculty and students" (*id.* at 33a), the court found that the Board had not justified the new plan under the *Swann* test.

The court therefore remanded the case once again. It directed the district court to "[t]ake evidence of [respondents'] and [petitioner's] alternatives to maintain racially balanced elementary schools within the framework of the changed circumstances that have occurred in the District"; to "[m]odify the Finger Plan to accommodate the changed circumstances"; in modifying the Plan, to "assure that faculties achieve racial balance"; and to

"retain jurisdiction for a reasonable period of time to oversee the implementation and maintenance of these assignments." Pet. App. 44a-45a.

b. Judge Baldock dissented. Pet. App. 46a-113a. He explained that because the District had achieved unitary status by 1985, it was entitled to a "lifting of the decree" (*id.* at 79a) and was therefore not required to meet the *Swann* test in defending the new K-4 Plan. In imposing the *Swann* standard, Judge Baldock noted, the court had mistakenly applied the rules governing "dual systems charged with the affirmative duty to eradicate *de jure* segregation and its vestiges"; the present case, he added, is "very different," in that "this board has met its affirmative duty and no longer is under 'an unsatisfied duty to liquidate a dual system.' " *Id.* at 51a-52a. In light of the unitariness finding, respondents "were required to demonstrate that the district had lost its unitary status through purposefully segregative school board actions." *Id.* at 50a.

Applying an intent standard—rather than the rule in *Swann* applied by the majority—Judge Baldock concluded that the new K-4 Plan did not undermine the District's unitariness. Pet. App. 52a. He noted that "[t]he district court's finding concerning increased parental involvement caused by the neighborhood plan, * * * and the efforts of the district to provide improved educational opportunity for all, * * * are not clearly erroneous." *Id.* at 102a. In Judge Baldock's view, the majority had mistakenly evaluated the evidence "against an improper legal standard given the unitary status of the school district." *Id.* at 99a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals has held that the Oklahoma City School District remains subject to a desegregation decree, notwithstanding unitariness findings entered by the district court in 1977, 1985, and 1987. Although its opinion is not free of ambiguity, the majority appeared to believe that unitariness, without more, is not a sufficient basis for dissolving a decree. In the majority's view, "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate" (Pet. App. 13a); as a result, the court held that a decree can be dissolved only upon "a clear showing of grievous wrong evoked by new and unforeseen conditions." *Id.* at 11a-12a. What is more, the majority suggested, the achievement of unitary status cannot by itself meet that standard. As the majority put it, "[t]he condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree." *Id.* at 13a.

In our view, the court of appeals' apparent conclusion—that unitary status does not entitle a school district to be relieved of a desegregation decree—cannot be squared with decisions of this Court recognizing the purposes of, and equitable limitations on, injunctive decrees in school desegregation cases. Moreover, because the court of appeals misapprehended the implications of unitariness, it failed to address the logically prior question: whether the Oklahoma City public schools were, in fact, unitary at the time the school board adopted the neighborhood school plan. Having applied an erroneous legal standard, the decision of the court of appeals should be vacated.

A. In school desegregation cases, "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brough: about." *Green* v. *County School Bd.*, 391 U.S. 430, 436 (1968). But as this Court has many times emphasized, it is only "[d]uring this period of transition" that the courts are to "retain jurisdiction of these cases." *Brown* v. *Board of Educ.* (*Brown II*), 349 U.S. 294, 301 (1956). The court of appeals' contrary view cannot be squared with this Court's cases. More generally, the decision below cannot be reconciled with a fundamental equitable principle that informs the school desegregation cases: "judicial powers may be exercised only on the basis of a constitutional violation," *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). In the absence of a continuing violation, there is no basis for continuing judicial relief. The court of appeals' decision—which rests on a mistaken reading of this Court's decision in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932)—cannot be sustained.

In the present case, the district court's 1977 Order Terminating Case may well have constituted a finding of unitariness entitling the school district to be released from further judicial supervision. Because there is some confusion about the meaning of that order, however, the court of appeals must examine the 1977 order on remand. If the court of appeals concludes that the 1977 order constituted a declaration that the school district was unitary in the required sense, it must dismiss the lawsuit against petitioners.

B. If, on the other hand, the court of appeals concludes on remand that the 1977 order did not constitute a sufficient finding of unitariness, it must then address the question whether, as the trial court plainly *did* find, the Oklahoma City public schools were unitary in 1985, when petitioners adopted the neighborhood school plan for grades K-4. This Court has not had occasion to define what it means for a previously dual system to be "unitary"; what is more, "[a]ppellate courts have provided district courts with little guidance regarding how to determine whether a school system has achieved unitary status." *Pitts* v. *Freeman*, 887 F.2d 1438, 1445 (11th Cir. 1989). Since, in our view, the case must in any event be remanded, we believe it would be appropriate to provide the court of appeals, and the lower federal courts generally, with guidance on what constitutes a unitary school district.

We believe that three broad inquiries should inform the question of unitariness: (1) whether the district has continuously complied with the desegregation decree in good faith; (2) whether the school district has abandoned any and all acts of intentional discrimination; and (3) whether the school district has eliminated, as far as practicable, the "vestiges" of prior discriminatory conduct.

ARGUMENT

THE COURT OF APPEALS APPLIED AN ERRONEOUS LEGAL STANDARD IN DECIDING WHETHER TO TERMINATE THE OKLAHOMA CITY SCHOOL DESEGREGATION DECREE

A. A School District That Has Achieved Unitary Status Is Entitled To Be Released From A Desegregation Decree

1. The "objective" of a desegregation decree, this Court observed in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971), is "to eliminate from the public schools all vestiges of state-imposed segregation." "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Green* v. *County School Bd.*, 391 U.S. 430, 436 (1968). In meeting that obligation, a school district must ensure that it has desegregated "every facet of school operations"—including "student bodies, * * * faculty, staff, transportation, extracurricular activities and facilities." *Id.* at 435.

But this Court has never suggested that a district that becomes unitary nevertheless remains subject to the underlying desegregation decree. To the contrary, beginning with *Brown* v. *Board of Educ.* (*Brown II*), 349 U.S. 294 (1955), this Court has made clear that court-ordered desegregation of a school system is a process with both a beginning and an end. As *Brown II* clearly teaches, the purpose of a decree is "to effectuate a *transition* to a racially nondiscriminatory system," and it is only "[d]uring this period of transition" that the courts are to "retain jurisdiction of these cases." *Id.* at 301. Accord *Green* v. *County School Bd.*, 391 U.S. at 439 (jurisdiction should be maintained "until it is clear that state-imposed segregation has been completely removed"); *Raney* v. *Board of Education*, 391 U.S. 443, 449 (1968) (jurisdiction should be retained "until it is clear that disestablishment [of the dual system] has been achieved").

So, too, in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, this Court addressed at length the scope of permissible remedial measures, reiterating that injunctive relief is only temporary. "At some point," the Court emphasized, "school

authorities and others like them should have achieved full compliance with this Court's decision in [*Brown* v. *Board of Educ.*, 347 U.S. 483 (1954)]. The systems would then be 'unitary' in the sense required by our decisions in *Green* and *Alexander* [v. *Holmes County*, 396 U.S. 19 (1969)]." To be sure, the Court observed, "[t]his does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. at 31-32. See also *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring in the judgment).

2. In this case, the court of appeals apparently took a different view. The panel majority suggested that unitariness, without more, does not entitle a school district to relief from a desegregation decree. Apart from showing unitariness, the court stated, a school district must also make "a clear showing of grievous wrong evoked by new and unforeseen conditions." Pet. App. 11a-12a. Unitariness is insufficient because, in the court's view, "[t]he condition that eventuates as a function of the injunction cannot alone become the basis for altering the decree." *Id.* at 13a.

That principle cannot be squared with this Court's recognition that a desegregation decree is a "transition[al]" remedy (*Brown II*, 349 U.S. at 301), not a permanent state of affairs. Nor can the lower court's decision be squared with traditional equitable principles. Unitariness is the *object* of the decree. Once that object has been achieved, the decree no longer serves its intended function. At that point, principles of equity require that the decree be dissolved: "the scope of the remedy is determined by the nature and extent of the constitutional violation" (*Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974)), and judicial remedial powers may extend "no farther than required by the nature and the extent of that violation." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982). As the Court explained in *Swann*, "judicial powers may be exercised

only on the basis of a constitutional violation," and "as with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 16. And precisely because those equitable principles are well settled, it is not surprising that the panel majority stands alone in holding that a court's authority over a school district extends beyond a proper finding of unitariness.[6]

3. Relying on *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), the court of appeals held that a school district seeking relief from an injunctive decree must demonstrate "dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor." Pet. App. 12a. In our view, the court of appeals misread *Swift*.

In *Swift*, several meat-packing companies moved to modify a consent decree, issued several years before, enjoining them from various monopolistic practices. Although this Court refused to modify the injunction, its decision recognized a court's inherent authority to alter a decree when the underlying circumstances have changed. As the Court put it, "[a] continuing decree of injunction directed to events to come is subject always to adapta-

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[6] See *Riddick* v. *School Bd.*, 784 F.2d 521, 535 (4th Cir.) ("once the goal of a unitary school system is achieved, the district court's role ends"), cert. denied, 479 U.S. 938 (1986); *United States* v. *Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987) ("Attaining unitary status * * * means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the Constitution"); *Spangler* v. *Pasadena Bd. of Educ.*, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring) ("When a court ordered remedy has accomplished its purpose, jurisdiction should terminate"); *Morgan* v. *Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("although the court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities"); *Jacksonville Branch, NAACP* v. *Duval County School Bd.*, 883 F.2d 945 (11th Cir. 1989) (once a district attains unitary status, "court supervision is no longer warranted"). In fact, a subsequent panel of the Tenth Circuit, in *Keyes* v. *School District No. 1*, 895 F.2d 659, 669 (1990), stated that a school desegregation decree "will terminate once the district is declared unitary."

tion as events may shape the need." 286 U.S. at 114. Many consent decrees, the Court observed, "involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Ibid.* Accordingly, "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *Id.* at 114-115.

On the facts of that case, the *Swift* Court did not find a sufficient basis for altering the decree. As the Court perceived the record, the meat-packers were "still in a position, even when acting separately, to starve out weaker rivals, or at least that the fear of such abuses, if rational in 1920, is still rational today." 286 U.S. at 117. And although the Court acknowledged that there had been some changes in the industry, it found no changes that bore "significantly upon the old-time abuses in the sale of other foods." *Ibid.* At the same time, *Swift* expressly recognized that where the decree's original purposes have been served, and there is no appreciable risk of renewed danger, a court enjoys full authority to terminate the injunction. As the Court put the matter in a later decision, "an injunction should be subject to modification when it appears that one or more of the restraints imposed are no longer needed to protect the public." *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 184 (1948).[7]

The court below relied, however, on a passage in *Swift* stating that the meat-packers had failed to prove that the injunction

[7] To be sure, the *Swift* Court emphasized that a party seeking relief from a decree bears an imposing burden of proof; "[t]he inquiry," as the Court put it, "is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow." 286 U.S. at 119. But while the burden of proof is rigorous, it is not insurmountable. To the contrary, as the Court has explained many times since *Swift*, "the settled rule of [this Court's] cases is that district courts retain power to modify injunctions in light of changed circumstances." *Dombrowski* v. *Pfister*, 380 U.S. 479, 492 (1965). Accord *Evans* v. *Jeff D.*, 475 U.S. 717, 726 (1986); *Arizona* v. *California*, 460 U.S. 605, 624-625 (1983). And that "well-established rule[ ] governing modification of even a final decree entered by a court of equity" is no less applicable in the special context of desegregation orders. *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 437 (1976).

was causing "grievous wrong evoked by new and unforeseen conditions"; citing that passage, the panel majority held that only "dramatic changes in conditions unforeseen at the time of the decree" could justify a termination of the Oklahoma City injunction. The cited language cannot bear so much weight. As the Court explained in *United States* v. *United Shoe Corp.*, 391 U.S. 244 (1968), the quoted passage "must, of course, be read in light of th[e] context" presented in *Swift*: a determination, on the facts presented, that "the danger of monopoly and of the elimination of competition which led to the initial government complaint and the decree had not been removed and that, although in some respects the decree had been effectuated, there was still a danger of unlawful restraints of trade." *Id.* at 248. Moreover, the *United Shoe* Court reiterated that when the purposes of the injunction *have* been fully served, the decree may be lifted. As the Court stated, "*Swift* teaches that a decree may be changed upon an appropriate showing, and holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree * * * have not been fully achieved." *Ibid.*

The panel majority's contrary reading would mandate perpetual decrees—and accompanying judicial supervision—as a general rule. Only "dramatically" changed and "unforeseen" circumstances could justify lifting a decree; the fact that the decree has served its purpose could never suffice—because it can hardly be viewed as unforeseen that a decree would accomplish its purpose.

4. Once a school district is declared unitary, and the decree is lifted, future conduct by the school authorities is once again governed by traditional equal protection standards, which prohibit only intentional acts of discrimination. *Washington* v. *Davis*, 426 U.S. 229 (1976). At that point, the local officials are no longer subject to obligations imposed on desegregating districts—that all actions must be measured simply by their *effect* on integration. See *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *Dayton Bd. of Educ.* v. *Brinkman*, 443

U.S. 526 (1979). As the Court stated in *Swann* (402 U.S. at 31-32):

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.[8]

We hasten to add that a declaration of unitariness, and a consequent termination of an effects standard, do not necessarily permit a return to a neighborhood plan. Intentional acts of racial segregation violate the Constitution and should be enjoined. In determining whether a proposed change in the student assignment plan suffers from such an illicit intent, a court may, of course, take into consideration both the segregative history of the school system and the foreseeability that the new plan will lead to racial imbalances. See *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-268 (1977). But once unitary, a school system should have available to it the same full range of legitimate educational choices – neighborhood schools, choice programs, magnet schools, and so forth – as other school systems.

5. In the present case, the district court declared the school system unitary in 1977, and the plaintiffs did not appeal from

[8] See also *United States* v. *Overton*, 834 F.2d at 1175 ("[a]ttaining unitary status * * * means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the Constitution"); *Vaughns* v. *Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985); *Riddick* v. *School Bd.*, 784 F.2d 521 (4th Cir.), cert. denied, 479 U.S. 938 (1986); *Pitts* v. *Freeman*, 755 F.2d 1423, 1426 (11th Cir. 1985).

that judgment. Even if erroneous, that judgment is now res judicata and, as the court of appeals itself observed, is "binding upon the parties." 795 F.2d at 1522. "The principles of collateral estoppel or issue preclusion are applicable to school desegregation cases." *Riddick* v. *School Bd.*, 784 F.2d 521, 531 (4th Cir.), cert. denied, 479 U.S. 938 (1986). See generally *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

There is some confusion, however, about precisely what the district court intended by its 1977 order.[9] How properly to construe Judge Bohanon's 1977 order is a question best left to the courts below. For his part, Judge Bohanon ruled in 1985 that his 1977 order *was* intended as a finding of unitariness in the required sense that "the School District had reached the goal of being a desegregated non-racially operated and unitary school system." 606 F. Supp. at 1554. Since that 1977 order was not appealed, it is not open to the court of appeals to question the *adequacy* of the unitariness finding. What was open to the court of appeals in 1986 – and what it should consider on remand from this Court – is whether the 1977 finding was *in fact* a finding of unitariness in the sense Judge Bohanon construed it in 1985. The court of appeals did not address this question because of its erroneous view that such a finding does not necessarily mean that judicial supervision must come to an end. If the court of appeals concludes that Judge Bohanon declared (whether rightly or wrongly) the school district unitary and therefore free from

[9] On the one hand, the order provided that the Board had "operated the Plan properly," had "slowly and painfully accomplished" a "unitary system," and was therefore "entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court." 606 F. Supp. at 1551. On the other hand, Judge Bohanon also stated that he did "not foresee that the termination of * * * jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system * * *." *Ibid.* The latter statement might suggest that Judge Bohanon did not intend the 1977 finding to release the Oklahoma City schools from the decree. If so, the school district would not have been found "unitary" in the required sense – a finding that entails "the mandatory devolution of power to local authorities." *Morgan* v. *Nucci*, 831 F.2d 313, 318 (1st Cir. 1987).

judicial oversight, it must dismiss the lawsuit on that ground; as we have explained above, such an unappealed finding is res judicata, and *Swift* imposes no further obligations on a unitary school district. If, on the other hand, the court concludes that Judge Bohanon did not intend to release petitioner from the decree in 1977, it must then determine whether the trial court's 1985 unitariness finding—which explicitly approved petitioner's decision to abandon the Finger Plan for grades K-4—was correct. We address the latter question below.

B. Because It Misunderstood The Consequences Of A Unitariness Finding, The Court Of Appeals Neglected To Consider Whether Oklahoma City Had, In Fact, Achieved A Unitary School System By The Time It Adopted The Neighborhood School Plan

As noted above, the case should be remanded for a determination whether the trial court's 1977 order in fact constituted a finding of unitariness. If the court of appeals concludes that the trial court in 1977 did *not* find the district to be unitary, it must then decide whether, as the trial court plainly *did* find, the school district was unitary in 1985, when petitioners adopted the neighborhood school plan. Because the court of appeals misunderstood the implications of a unitariness finding, it never addressed that question.

This Court has not had occasion to define what it means to be "unitary," and, more generally, "[a]ppellate courts have provided district courts with little guidance regarding how to determine whether a school system has achieved unitary status." *Pitts* v. *Freeman*, 887 F.2d 1438, 1445 (11th Cir. 1989). Because the case should in any event be remanded, we believe it would be appropriate to provide the court of appeals, and the lower federal courts generally, with much-needed guidance on what constitutes a unitary school district. In our judgment, three broad inquiries should inform the issue of unitariness: (1) whether the district has continuously complied in good faith with the desegregation decree; (2) whether the school district has abandoned any and all acts of intentional discrimination; and

(3) whether the school district has eliminated, as far as practicable, the "vestiges" of prior discriminatory conduct, as principally defined by this Court's decision in *Green* v. *County School Bd.*, 391 U.S. 430 (1968).

1. First and foremost, the school district must faithfully observe the dictates of the desegregation decree over a continuous period of time. As the First Circuit recently explained, "a sufficiently well-established history of good faith in both the operation of the educational system in general and the implementation of the court's student assignment orders in particular * * * indicate[s] that further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention." *Morgan* v. *Nucci*, 831 F.2d 313, 321 (1987).

The importance of faithful, consistent compliance is closely tied to this Court's decisions articulating the purposes of the underlying decree, and the broad discretion afforded to district courts in formulating such decrees. As the Court has explained, a trial judge "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Green* v. *County School Bd.*, 391 U.S. at 438 n.4. To pass constitutional muster, a plan must therefore "provide meaningful assurance of prompt and effective disestablishment of a dual system" (*id.* at 438)—thereby ensuring that the district will "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*Raney* v. *Board of Educ.*, 391 U.S. 443, 448 (1968)). Toward that end, a district court enjoys broad remedial authority—bounded, of course, by the scope of the constitutional violation and prudential limitations on judicial power—to fashion a decree that fully transforms the dual system "to a unitary system in which racial discrimination [has been] eliminated root and branch" (*Green*, 391 U.S. at 438). And should the decree prove inadequate to the task, the plaintiffs should promptly seek its modification, by moving for appropriate relief in the district court. Compare *United States* v. *Lawrence County School Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986) with *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. at 435-436.

It follows, in our view, that faithful, continuous compliance with such a well-conceived plan—a "plan that promises realistically to work, and promises realistically to work *now*" (*Green*, 391 U.S. at 439)—is compelling evidence that the school district has become unitary. By doing exactly what the trial court mandated, pursuant to the court's constitutional obligation to ensure the "effective disestablishment of a dual system" (*id.* at 438), a school district goes far in showing that it has fulfilled its duty under the Constitution. See *Spangler* v. *Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1244 (9th Cir. 1979) (Kennedy, J., concurring) ("compliance with the Pasadena Plan for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies"). At the same time, faithful compliance with the decree affords considerable assurance that the school board will not revert to its prior practices once released from further judicial oversight.

In assessing the board's compliance with the decree, two factors are central. The first is the *length* of compliance. Eliminating the effects of a segregated system that has been in place for many years cannot be accomplished overnight. "It should go without saying that a system does not become unitary merely upon entry of a court order intended to transform it into a unitary system." *United States* v. *Lawrence County School Dist.*, 799 F.2d at 1037. Conversely, effective implementation of a plan over a sustained period is strong evidence that the link between any remaining or prospective racial imbalances and the official dual system has been broken. In the present case, for example, the school district complied with the Finger Plan for thirteen years—during which time an entire school population, from kindergarten through twelfth grade, matriculated in a racially unidentifiable school system. Cf. *Ross* v. *Houston Independent School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983) ("After twelve years of court-supervised desegregation efforts, this case has reached the stage where no benefit can be derived from further probing for the perhaps unmeasurable sins of the past").

The second factor is the *quality* of the board's compliance. In this connection, a court should consider whether the plaintiffs have been required to secure enforcement orders during the life of the decree, or, what is worse, have been constrained to obtain contempt citations against school officials.

2. In addition to faithful observance of the decree, a unitary school system may not adopt any new practices that discriminate among students on the basis of race. That is the central teaching of *Brown*. "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494. What is "[a]t stake," the Court reiterated in *Brown II*, "is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." 349 U.S. at 300.

3. Finally, a school district seeking to be declared unitary must demonstrate that it has eliminated the vestiges of its prior acts of discrimination. "The objective," the Court has noted, is "to eliminate from the public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S. at 15.

a. The Court's cases have tied the concept of "vestiges" closely to the underlying discrimination. The pivotal case in that respect is *Green*. There, the Court looked "not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." 391 U.S. at 435. Similarly, in *Swann*, the Court observed that "existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities" are "among the most important indicia of a segregated system." 402 U.S. at 18. And in *Keyes* v. *School District No. 1*, 413 U.S. 189, 196 (1973), this Court again focused on what have come to be known as the "*Green* factors." "In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration."

For three related reasons, we believe that the "*Green* factors" should be the primary focus of a court when it assesses the extent to which the "vestiges" of discrimination have been eliminated. First, those factors are the ones that most clearly identify a school as "Black" or "White." The racial stratification of the school itself—in its students, faculties, plant and equipment, and services and operations—is the plainest evidence of a dual system. Second, the *Green* factors are the most immediate byproduct of intentional racial discrimination in the school system and, indeed, provide the clearest evidence that school authorities have engaged in discriminatory conduct. Finally, because they are the most direct result of official discriminatory conduct, the *Green* factors are the most amenable to change through decree. These are the areas over which school officials generally have direct control. There is every reason, therefore, to impose on them an exacting standard to rid the system of the vestiges of discrimination in each of the areas identified in *Green*.[10]

The courts of appeals have generally taken the same approach in assessing whether a school district is unitary. In *Riddick* v. *School Bd.*, 784 F.2d 521, cert. denied, 479 U.S. 938 (1986), for example, the Fourth Circuit upheld a finding that the Norfolk school system was unitary and was therefore entitled to abandon a busing plan in favor of a neighborhood school plan. Relying on *Green*, the court explained that "[a]ll aspects of public education must be freed from the vestiges of state sanctioned racial segregation before a school system becomes unitary"—including, in particular, "the system's faculty, staff, transportation practices, extracurricular activities, facilities and pupil assignments." *Id.* at 533. In the case before it, the court of appeals observed, the trial judge had "reviewed all six factors set out in *Green* and found that Norfolk's school system had remained unitary since 1975." *Id.* at 534. Because "substantial evidence" supported those findings, the court of appeals upheld the trial court's unitariness determination. *Ibid.*

[10] Compliance with such a standard, however, "does not require any particular racial balance in each 'school, grade or classroom.'" *Milliken* v. *Bradley*, 418 U.S. 717, 740-741 (1974). See also *Swann*, 402 U.S. at 24.

More recently, the Eleventh Circuit applied the same principles in *Pitts* v. *Freeman*, 887 F.2d 1438 (1989). Noting the "six factors set forth in *Green*," the court stated that "[a] review of these six factors constitutes the best approach for determining whether a school system has eliminated the vestiges of a dual system." *Id.* at 1445-1446. Accordingly, the court held, if a school system "fulfills all six factors at the same time for several years, the court should declare that the school system has achieved unitary status. If the school system fails to fulfill all six factors at the same time for several years, the district court should retain jurisdiction." *Id.* at 1446 (emphasis omitted).[11]

b. The question remains, however, whether a court may look beyond the *Green* factors in determining whether a school district has eliminated the vestiges of racial discrimination. In any given case, discrimination in the school system may have wide-ranging implications for the society at large; any one of those implications, no matter how far removed, can theoretically be deemed a "vestige" of an original act of intentional discrimination.

Residential segregation provides one example. As this Court has noted, a practice of confining students of one race to particular schools will have a reciprocal effect on the development of other schools, "and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." *Keyes*, 413 U.S. at 202.[12] At the same time, however, there may be "quite normal

[11] See also *Quarles* v. *Oxford Municipal Separate School Dist.*, 868 F.2d 750, 753 (5th Cir. 1989) (referring to "the six factors the Supreme Court has specified for consideration in determining whether a school system has achieved unitary status"); *United States* v. *Overton*, 834 F.2d 1171, 1176 (5th Cir. 1987); *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987); *United States* v. *Lawrence County School Dist.*, 799 F.2d 1031, 1034 (5th Cir. 1986).

[12] See also *Swann*, 402 U.S. at 21; *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 465 n.13 (1979) ("school segregation is a contributing cause of housing segregation"); *Pitts* v. *Freeman*, 887 F.2d at 1449 n.12.

pattern[s] of human migration [that] result[ ] in some changes in the demographics of * * * residential patterns," which may not be "attributed to any segregative actions on the part" of school officials. *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. at 436. See also *Swann*, 402 U.S. at 31-32. And even where housing patterns can, to some degree, be traced to segregation in the school system, such patterns typically also depend upon a wide array of private and other public factors. As a result, it may well be beyond the capability of school officials to alter residential patterns sufficiently to prevent housing segregation from affecting attendance patterns. See *Ross* v. *Houston Independent School Dist.*, 699 F.2d 218 (5th Cir. 1983).[13]

Because they are more remote from the original acts of discrimination, and more inherently intractable, the ripple effects of school segregation must be assessed, if at all, much differently from the *Green* factors. Courts should recognize, as this Court did in *Keyes*, that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of * * * warranting judicial intervention." 413 U.S. at 211. Where a school board has (1) faithfully complied with a decree over a continuous period, (2) engaged in no new discriminatory practices, and (3) eliminated the vestiges of discrimination in all of the areas

[13] In *Ross*, the parties agreed that the school district was "unitary in every aspect but the existence of a homogeneous student population." 699 F.2d at 228. The plaintiffs opposed a finding of unitariness, however, on the ground that "the large number of one-race schools" resulted from "housing patterns" linked to the school district's "past segregative actions." *Id.* at 226. In rejecting that argument, the court of appeals acknowledged the ripple effect of prior school segregation, noting that "[c]urrent housing patterns may still show the lingering effects of school board actions that preceded the * * * desegregation order." *Ibid.* Nevertheless, the court of appeals explained that it was "not persuaded that the district judge was in error when he rejected the possible probative value of further proceedings to demonstrate that earlier housing patterns resulted from official school segregation policy apart from other community economic and social influence." *Id.* at 226-227. The court therefore upheld the trial court's finding that the school district had "done everything practicable at an intradistrict level to eradicate the effects of past segregative practices." *Id.* at 227.

identified in *Green*, the strong presumption should be that any further "vestige" of discrimination has been attenuated.

In the present case, the Court need not decide whether, and if so how, to assess the significance of residential segregation. The trial court examined the issue in detail and concluded that the Board had taken "absolutely no action which has caused or contributed to the patterns of the residential segregation which presently exist in areas of Oklahoma City." Pet. App. 17b-18b. To the contrary, the court stated, "the actions of the Board of Education, through implementation of the Finger Plan at all grade levels for more than a decade, have fostered the neighborhood integration which has occurred in Oklahoma City." *Id.* at 18b. On any view of the matter, those findings, if not clearly erroneous, are entirely sufficient.[14]

* * * * *

Because it misapprehended the implications of a unitariness finding, the court of appeals failed to resolve two logically prior questions: (1) whether the district court's 1977 Order Terminating Case constituted a finding of unitariness (whether correct or not), thus foreclosing further judicial superintendence of the Oklahoma City schools; and if not, (2) whether the district court erred when it found the schools to be unitary in 1985, prior to the adoption of the neighborhood school plan for grades K-4. In our view, a remand is therefore necessary.

[14] In making unitariness determinations, reviewing courts must be guided by the factual findings of the trial court, to the extent those are not clearly erroneous or subject to legal error. See *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. at 457 n.6; *Milliken* v. *Bradley*, 433 U.S. 267, 287 n.18 (1977); *Brown II*, 349 U.S. at 299; *Flax* v. *Potts*, 864 F.2d 1157, 1160 (5th Cir. 1989).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE BOARD OF EDUCATION OF
OKLAHOMA CITY PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 89,
OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, ET AL,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF INTERVENORS IN *CARLIN V. BOARD OF EDUCATION SAN DIEGO UNIFIED SCHOOL DISTRICT* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER FOR REVERSAL

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BRIEF OF INTERVENORS IN *CARLIN V. BOARD OF EDUCATION* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER FOR REVERSAL

INTEREST OF *AMICI CURIAE**

Amici Curiae are Intervenors--opposing mandatory racial assignments--in the school desegregation case entitled *Carlin, et al.*, Plaintiffs, *v. Board of Education, San Diego Unified School District*, Defendant; *Groundswell, et al.*, Intervenors, No. 303800, Superior Court, San Diego County, California. This Court may take judicial notice of proceedings in the "Carlin" case.

The *Carlin* complaint, based upon *stare decisis* application of judicial decisions, was filed December 4, 1967, as a class action by certain black students, among others, versus the Defendant Board of Education to "integrate" the San Diego Unified School District. The class was described in the Order Determining Existence of Class Action, filed December 7, 1973, as--

> "All students attending the San Diego Unified School District and their parents and legal guardians who believe that said schools should be racially balanced, if necessary through court order."

Amici--including an association of persons called "Groundswell," and some individual students and their parents--intervened on December 15, 1980. They alleged in their complaint in intervention (pp. 8-10) that it was unconstitutional to assign the six intervening students and other students similarly situated, because of their race, to particular schools.

Amici later offered proof of signed petitions by 1856 District students, each "object(ing) to school authorities making

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*This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

me, because of my race, go away from my neighborhood public school location to classes, without my consent and the consent of my parents, as a violation of my rights." Although these petitions were not received in evidence, their existence was established and an excerpt from an exemplar, marked as a part of *Carlin* Intervenors' Exhibit 6 for Identification, is annexed as the Appendix. See *Carlin* reporter's transcript of proceedings, July 16, 1981, pp. 190-197.

Although the *Carlin* Court has filed an "Order re Integration Plan/Final Order" on May 21, 1985, which like the trial court's order herein permits neighborhood school assignments, it has retained continuing jurisdiction (p.12). Thus, those having the status of *Amici* students remain subject to renewal of the contention that racial imbalance through causes not attributable to them call for their being racially reassigned beyond their neighborhood schools.

Here, as the dissent to the majority opinion at 890 F.2d 1483 on October 6, 1989, states, "this (Tenth Circuit) court retains jurisdiction and now orders the (Oklahoma City) school district to racially balance the elementary schools which will most certainly require busing." 890 F.2d at 1506. Should the panel majority's order be allowed to stand on this record, San Diego "anti-busing" students would become even more vulnerable to a request for racial balancing under the *stare decisis* doctrine.

The unwillingness of a number of students to be racially assigned away from their neighborhood schools may be inferred from the trial court's finding of the probability of "white flight" if a "busing" order is carried out. *Dowell v. Okl. City Public Schools, Ind. Dist. 89,* 677 F.Supp. 1503 at 1525 (1987).

Such "busing" assignments would be a form of racial discrimination, another form of which prompted the appointment of an *amicus curiae* in *Bob Jones University v. United States,* 456 U.S. 922 (1982). It raises issues sufficiently similar to those in *Bob Jones University v. United States,* 461 U.S. 574 (1983), to garner additional support therefrom for considering the following presentation by *Amici Curiae*.

SUMMARY OF ARGUMENT

All Oklahoma City students in grades K-4 have been allowed to attend their neighborhood schools since 1985 when the compulsory racial assignments to other schools, required by a 1972 desegregation plan, were ended by the school board. The District Court upheld the neighborhood school plan in June, 1987 (after a hearing in which it dissolved the 1972 desegregation decree), finding that during the plan's operation the school system has been "unitary" under the *Swann* Doctrine. *Dowell v. Okl. City Public Schools, Ind. Dist. 89,* 677 F.Supp. 1503,1519,1526 (1987). See*Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1,32 (1971).

A divided three-judge panel of the United States Court of Appeals for the Tenth Circuit, over a vigorous dissent by Judge Bobby R. Baldock, reversed the district court decision and disapproved the neighborhood school plan. 890 F.2d 1483. The panel majority's decree will require the racial assignments of unwilling students to reduce the racial imbalance that the panel found to exist in some of the K-4 schools. See dissent, 890 F.2d at 1506.

The appellate desegregation decree is unique, to echo Justice Lewis F. Powell, Jr., because its burden--compelling children to leave their neighborhood and spend significant time each day being transported to a distant school--will fall upon innocent children and parents who are not charged with any offending action. *Austin Independent School District v. United States*, 429 U.S. 990, at 995, Footnote 5 (1976), and *Keyes v. School District No. 1, Denver, Colo.* (1972), 413 U.S. 189 at 247, Powell, J., concurring.

Amici complained in their intervention (pp. 9-10) that the imposition of such a burden upon the intervening students in *Carlin*, and other San Diego students similarly situated, would racially discriminate against them and unconstitutionally infringe upon their liberty and privacy. These grounds apply with added force here in that the permanent nature of the proposed burden upon five-to-ten-year-olds disregards the *Swann* remedy limitations referred to by the trial court. *Dowell,* supra, 677

F.Supp. at 1521. *Swann*, supra, 402 U.S. at 23,31-32.

When a mandatory elementary school assignment, under these conditions, is based solely upon the race of an unwilling child, that child is unconstitutionally discriminated against, regardless of the purpose, under the racially neutral language in *Brown v. Board of Education (Brown II)*, (1955) 349 U.S. 294, at 298 "that racial discrimination in public education is unconstitutional."

Court-ordered racial assignments away from one's neighborhood school impair the assigned children's liberty and privacy, to paraphrase Justice Powell in *Keyes*, supra, 413 U.S. at 247. They violate the Fifth Amendment of the Constitution as to those unwilling, innocent assignees of tender age unable to obtain continuing individual representation, who are not parties, regardless of its purpose. For those children have not had the hearing that Amendment requires by its clause that "(n)o person shall...be deprived of life, liberty, or property, without due process of law." Compare *Martin v. Wilks*, 109 S.Ct. 2180,2185 (1989).

This Court may consider these children's rights favorably. Compare *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. State of Connecticut*, 381 U.S. 479, 481 (1965); and *Bob Jones University*, supra, 461 U.S., at 593.

In summary, these Oklahoma City students are constitutionally protected from being racially discriminated against and having their liberty and privacy impaired by being mandatorily reassigned indefinitely to other than their neighborhood elementary schools for racial balance.

ARGUMENT

I. BACKGROUND: DESEGREGATION CASES ARE UNIQUE

A divided United States Court of Appeals three-judge panel for the Tenth Circuit has held unconstitutional the discontinuance of busing for racial balance and the adoption of a neighborhood school plan for K-4 students by petitioner because it has left some schools racially imbalanced. 890 F.2d 1483.

The trial court had dissolved the injunction under a 1972 desegregation decree requiring such busing, holding that the school system had retained a unitary status and that the neighborhood plan had been adopted without discriminatory intent. *Dowell*, supra, 677 F.Supp. at 1515-21.

Judge Baldock, in dissent, deplored the panel majority's failure to terminate jurisdiction "when a system has achieved and maintained unitary status." 890 F.2d at 1506. Fn. 1. The dissent emphasized Justice Powell's observation commencing his dissents in the 1979 Columbus and Dayton desegregation cases, that "25 years after *Brown v. Board of Educ. (Brown I)*... 'the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country.'" 890 F.2d at 1506. Fn. 1.

To meet the terms of the appellate order, *Amici* believe the trial court will have to order the petitioning school board to indefinitely reassign nonconsenting, nonparty elementary students, solely on a racial basis, beyond their neighborhood schools along the lines sought by Respondents at the trial. See *Dowell*, supra, 677 F.Supp. at 1524-25.

A. *Amici Curiae's* Presentation is Appropriate

The affirmative relief rendered by the panel majority adversely affects parties not joined in Oklahoma City, and others like the students in San Diego and elsewhere by virtue of the *stare decisis* doctrine. And it is inconsistent with the national policy against racial discrimination in education, as set forth in *Bob Jones University*, supra, 461 U.S. at 593. These

exceptional circumstances permit *Amici* to present issues beyond that of the impact of "white flight" upon the litigants. Compare *Amer. Meat Institute v. Environ. Prot. Agcy.*, 526 F.2d 442, at 449 (7th Cir. 1975).

Contentions by *amici curiae*, raised in behalf of nonparty students, have been considered in desegregation cases. A key pronouncement in the seminal California case of *Jackson v. Pasadena City School Dist.*, 59 Cal.2d 876, at 881, rendered June 27, 1963, pertained to school district responsibility for affirmative integration in schools in addition to the defendant Pasadena district:

> "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."

Footnote 5 in Note, 51 Cal.L.Rev. 810 (1963) points out that the complaint in *Jackson*, supra, --

> "was drawn on the theory of affirmative segregation and in the intermediate appellate court, counsel for plaintiff expressly denied that he was advocating affirmative integration. 210 A.C.A. at 658, 16 Cal.Rptr. at 665. The question was not argued in the briefs of either party. Affirmative integration was urged, however, in two *amici curiae* briefs."

This dictum, under the *stare decisis* doctrine, became the basis of the decision in 1976 in *Crawford v. Board of Education*, 17 Cal.3d 280, which decreed affirmative integration (which continues in effect except as to "busing") in California without the showing of *de jure* segregation required by federal decisions. The "busing" authorized by *Crawford* was disallowed by a 1979 "anti-busing" amendment to Section 7A, Article I, of the California Constitution, ultimately upheld in *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, at 533 (1982).

Like the *amici* in *Jackson*, supra, *Amici* here are presenting underlying issues involving nonparties, which may be entertained favorably.

B. History Leading to the *Swann* Doctrine

In 1896, the United States Supreme Court held in *Plessy v. Ferguson*, 163 U.S. 537, that the segregation of the races in transportation facilities did not violate the Constitution so long as the facilities were equal. The majority opinion rationalized that any discrimination felt by black persons assigned to separate facilities, since they were equal to those used by whites, was "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U.S. at 551.

Justice John Marshall Harlan (I) vigorously dissented, and his rationale is summarized by Professor Bernard Schwartz in *The Supreme Court* (Ronald Press, 1957) at page 269:

> "Yet, even if the *Plessy* Court were correct in its assumption that segregation is not discrimination, that would not make its doctrine consistent with the equal protection clause. For that clause bars the states from making legal distinctions that are not supported by reasonable legislative classifications, and, as already emphasized, classification on the basis of race must be deemed irrational. Our Constitution, to use the apt description of the dissenting Justice in the Plessy case, is color-blind; it neither knows nor tolerates classification on racial grounds."

Plessy was overruled in 1954 when *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 495, declared that "in the field of public education the doctrine of 'separate but equal' has no place," and that by forcing the black plaintiffs to attend separate schools solely because of their race, the respondents denied them equal protection of the laws under the Fourteenth Amendment to the Constitution. In *Brown I*, the Court was considering the complaints of black children that they were discriminated against by being segregated solely because of

their race in separate public schools administered by the respondent school authorities under the laws of Kansas, South Carolina, Virginia and Delaware, respectively.

Brown I agreed with Justice Harlan I as to the unconstitutionality of such actions under state laws permitting or mandating them. However, it did not mention the Harlan dissent and tended to focus upon their effect (segregation) rather than the acts of discrimination. *Brown I* was initially construed as negative in nature, calling only for state neutrality, as explained by Justice Powell in his concurrence in *Keyes*, supra, 413 U.S. 189 at 220:

> "It was impermissible under the Constitution for the States, or their instrumentalities to force children to attend segregated schools. The forbidden action was *de jure*, and the opinion in *Brown I* was construed--for some years and by many courts--as requiring only state neutrality, allowing 'freedom of choice' as to schools to be attended so long as the State itself assured that the choice was genuinely free of official restraint."

Justice Powell goes on to say in *Keyes* that the doctrine of *Brown I*, as amplified by *Brown II*, did not retain its original meaning:

> "In a series of decisions extending from 1954 to 1971 the concept of state neutrality was transformed into the present constitutional doctrine requiring affirmative state action to desegregate school systems. The keystone case was *Green v. County School Board*, 391 U.S. 430, 437-438... (1968), where school boards were declared to have 'the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" 413 U.S. 220.

Thus, Justice Powell explained, the affirmative-duty concept articulated in a rural setting in *Green* flowered in *Swann v. Charlotte-Mecklenburg Board of Education*, supra, into a new constitutional principle of general application to large

urban areas as well.

C. The *Swann* Doctrine Does Not Favor Protracted Busing

A truism in the American system of justice is that it is delegated to the counsel of the parties the task of shaping the issues which are brought before the appellate courts. Edward M. Wright, *Witkin on Appellate Court Attorneys*, 54 Cal.St.Bar Journal 106 (1979).

The issues were shaped in *Brown, Green* and *Swann*--relied on for judicially-ordered busing of bystanders--by the counsel for the only parties to those actions, namely, the minority plaintiffs versus the defendant school authorities.

In *Swann*, a desegregation plan had been approved for a large urban district by the District Court in 1965 based on geographic zoning with a free transfer provision, leaving some schools racially imbalanced. 402 U.S. at 6,7 (1971).

After the decision in *Green* and companion cases, the *Swann* plaintiffs moved in September, 1968, for further relief based on those cases. The District Court then in effect required a plan desegregating all the schools, including the elementary schools, to be accomplished by busing students beyond their neighborhood schools so that the student bodies throughout the system would range from 9% to 38% black. Id. at 7-11.

This Court noted that **all the parties agreed** (emphasis by *Amici)* that "in 1969 the system fell short of achieving the unitary system that those (*Green* and companion) cases require;" but that the board..."reiterated its view that the plan was unreasonable." Id. at 7,11.

Dealing with the facts and issue thus presented to it, this Court stated:

> **"On the facts of this case,** we are unable to conclude that the order of the District Court is not reasonable, feasible and workable..." Emphasis

supplied. Id. at 32.

However, the Court also indicated the temporary nature of the judicial role.

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be 'unitary' in the sense required by our decision in *Green* and *Alexander*.
>
> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." Id. at 31,32.

When this Court was considering the reasonableness of the *Swann* plan the whites were a majority of 71% in the Charlotte school system. 402 U.S. at 6. In Oklahoma City, the whites are becoming a minority (from 73% in 1969 to 47% in 1986); and the rest--blacks (40% in 1986) and others classified as "minorities" (13% in 1986)--are a emerging majority, (from 27% in 1969 to 53% in 1986), which will accelerate with expanded busing. *Dowell*, supra, 677 F.Supp. at 1509, 1525.

The absence of "anti-busing" students as parties in *Swann* claiming a constitutional right not to be racially bused from their neighborhood schools led to a lack of reference to that right in considering the board's claim the busing plan was unreasonable.

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process... It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann*, supra, 402 U.S. at 31,32.

Consideration of the bystanders' rights under the different circumstances in this case is warranted in the light of the *Swann* Court's statement that "(a)bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." Id. at 28.

II. COURT-EXTENDED RACIAL ASSIGNMENTS UNCONSTITUTIONALLY DISCRIMINATE AGAINST UNWILLING K-4 BYSTANDERS

> "(A) desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather upon innocent children and parents."

So Justice Powell concluded in Footnote 7 in concurring in *Austin Independent School District*, supr., 429 U.S. at 995.

The authority for burdening innocent children under the desegregation decree below rests upon precedents interpreting *Brown v. Board of Education*. As shown, these precedents were established in cases in which "anti-busing" students were not parties and their rights were not individually articulated. That there are many such objecting students of various races is evidenced by their actions when the reversal of a Los Angeles Superior Court's busing order became effective on April 20,

1981. Among about 7,000 students immediately returning to their neighborhood schools for the few remaining weeks of the school year were 4,300 "minority" students. *Crawford*, supra, 458 U.S. at 534, Fn. 10. Here, the dissent noted support of the neighborhood plan by two black parents, one of whom had collected 400 signatures favoring it. 890 F.2d at 1531. Fn. 25.

The unique position of these children is pointed out in terms of their parents' feelings by the *Carlin* Court in its Memorandum Decision and Order on March 9, 1977:

> "There is a substantial percentage of minority parents, as well as majority parents, who prefer to have their children attend neighborhood schools (footnote omitted). Most 'Hispanics' (41% of the minority school population) do not want their children sent to 'Anglo' schools where they will not have the security, fellowship and bilingual program of the neighborhood school. A substantial number of black parents also object to 'busing' for various reasons. These parents have not had an opportunity to be heard in these proceedings..." Page 21.

And school board attempts to present nonparty views by arguing, for instance, "flight by whites," if bused, have been considered irrelevant because "the vitality of these constitutional principles (justifying busing) cannot be allowed to yield simply because of disagreement with them." *Monroe v. Board of Com'rs of City of Jackson, Tenn.*, 391 U.S. 452,459 (1968).

Consequently, "anti-busing" students have been treated as "elements" in school desegregation cases in the manner described by then-Justice William H. Rehnquist in his order denying the request of the school board for a stay of a "busing" order in *Board of Ed., Etc. v. Superior Court of Cal.* (1980) 448 U.S. 1343 at 1348:

> "...The Board's primary contention here is that 'white flight,' which all parties concede has taken place in the school district, will accelerate if this plan is put into effect... Because projections indicated that the school district in 1987 will consist of only 14% white students, the Superior Court asserted that its task was to achieve the optimal use of white students in the schools so that the maximum numbers of schools may be desegregated.
>
> "I find this analysis somewhat troublesome, since it puts 'white' students much in the position of textbooks, visual aids, and the like--an element that every good school should have. And it appears clear that this Court, sooner or later, will have to confront the issue of 'white flight' by whatever term it is denominated..."

Since the decision of the Court of Appeals below raises the specter of "white flight," it is appropriate to confront that issue in the broad sense both of the meaning of that term and of the holding in *Brown v. Board of Education*.

Dr. James A. Coleman, senior author of the 1966 *Equality of Educational Opportunity Survey*, points out that the flight from city schools beyond the reach of mandatory busing orders, which accelerates when blacks begin outnumbering whites, has included "middle-class" blacks as well as whites. *A Scholar Who Inspired It Says Busing Backfired*. The National Observer, June 27, 1975, pp. 1,18.

Dr. Coleman describes the actual decision in *Brown* as "in fact a confusion of two unrelated premises: this new concept, which looked at results of schooling, and the legal premise that the use of race as a basis for school assignment violates fundamental freedoms." *The Concept of Equality of Educational Opportunity*, reprinted in Part III of *The "Inequality" Controversy*, Donald N. Levine, Mary Jo Bane, Editors (Basic Books, 1975), Page 206. This is a fair description when *Brown I* and *Brown II* are read together with *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The "new concept" is derived from the initial answer to the question in *Brown I* whether "segregation of children in public schools solely on the basis of race even though the physical facilities may be equal deprive(s) the children of the minority group of equal educational opportunities?" 347 U.S. at 493.

The Court's immediate answer was that such segregation, with the sanction of law, had a detrimental effect upon their educational opportunities, as denoting their inferiority, having the tendency to retard their educational and mental development, and depriving them of some of the benefits they would receive in a racially integrated school system. This is social in nature because it rests primarily upon evidence then available from the social sciences cited in *Brown I*, 347 U.S. at 494, Fn. 11.

But *Brown* rests also on the legal premise stated in racially-neutral language in *Brown II* that "(t)he opinions (of *Brown I* and *Bolling)*... **declaring the fundamental principle that racial discrimination in public education is unconstitutional,** are incorporated herein by reference." 349 U.S. at 297. (Emphasis added.) It is too narrow a reading of *Brown* to consider that "racial discrimination in public education is unconstitutional" only in terms of detrimental result to a particular minority perceived primarily, if not entirely, from their ratio to students of other races in some schools of a school system.

Bolling found that the separation of black plaintiffs from whites in the District of Columbia, which could be accomplished only by the use of racial classifications, was so unjustifiable as to deprive plaintiffs of their liberty in violation of the Due Process Clause of the Fifth Amendment. *Bolling*, supra, 348 U.S. at 498-9. The use of racial classifications, which *Bolling* referred to (348 U.S. at 498) and disapproved, was no less a factor in accomplishing the separation of "minority" students in Kansas, Delaware, South Carolina and Virginia, as was recognized in *Brown II* by the incorporation of *Bolling*.

Brown II ruled that the district courts were to supervise the school districts involved in all three decisions in their "transition to a system of public education freed of racial discrimination." 349 U.S. at 299. This consistent use of racially-neutral language in *Brown II* proscribing racial discrimination emphasizes *Brown's* legal premise. It is distinguishable from *Brown's* social premise because its major influence are principles which bind the judges as well as the litigants, and which apply uniformly to all persons not only

today but yesterday and tomorrow. See, generally, Archibald Cox, *The Role of the Supreme Court in American Government* (Oxford Press, 1976), pp. 109-113.

The two premises are compatible in *Brown I* because the unconstitutional racial separation and consequent detriment suffered by those so separated was caused by a violation of the legal premise that "racial discrimination in public education is unconstitutional..." *Brown II*, 349 U.S. at 297.

However, the social premise is not applicable here because of changes in the conditions from those in *Brown*. Among the changes, in addition to eliminating the type of deliberate racial separation condemned by *Brown*, are the many continuing affirmative remedial steps to integrate the system set forth by the trial judge. *Dowell*, 677 F.Supp. at 1522-24 (1987).

Another change is the progressive outnumbering of whites by "minorities" in Oklahoma City. The *stare decisis* applicability of *Brown's* social premise when whites became significantly outnumbered was questioned by a California Court of Appeal in Los Angeles, after noting in*Crawford v. Board of Education*, 113 Cal.App.3d 633,642(1980) that the school district was 53.6% white in 1968:

> "That (outnumbering) of course is the existing situation in the District, where white students are now a minority in that they comprise 23.7 percent of the total student population and 16.1 percent of grades K-3. Yet for the purposes of applying the legal principles related to school segregation, whites are still designated as the 'majority,' and segregation is viewed in terms of the minorities, or any one of them, being isolated from whites." 113 Cal.App.3d 633 at 648 (1980).
>
> "That approach appears to be a hangover from the historic situation in some areas of the county which produced the background against which the decision in *Brown v. Board of Education*, supra, was rendered.
>
> "The wisdom of, or the need to, perpetuate that

approach here is questionable since, when considered in terms of the ethnic composition of the Los Angeles Unified School District, it appears to denigrate the dignity and capability of the minority students. In effect, it implies that ethnic 'minority' children, even when they constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students." Id., Footnote 3.

The cause of the objectionable result found in *Brown* was racial busing of students like complainant Brown past their neighborhood schools for the social purpose of racial separation. But in reliance upon the social premise, more is now sought than allowing such students to attend their neighborhood schools, or to attend other schools voluntarily for integrative purposes, and continuing other integrative programs. What is sought is that the petitioning school authorities come full circle and reinstate racial busing of elementary students, some being no more willing than complainant Brown, past their neighborhood schools for the social purpose of racial mixing.

Under these facts, the equal protection guarantee to all persons does not entitle Respondents to a degree of protection greater than that accorded other students. *Regents of University of California* v. *Bakke*, 438 U.S. 265, at 295 (1978).

The interests advanced by *Amici* may be compared to those advocated by the *amicus* in *Bob Jones University*, supra, 461 U.S. 574. Bob Jones University, a private religious university, had a policy prohibiting interracial dating and marriage by its white and black students. This was racially discriminatory, according to Internal Revenue Service policy, which formed the basis for denying a claimed tax exempt status. Id. at 581.

This Court pointed out that there is a national policy against racial discrimination in education, and that the Government has a fundamental, overriding interest in erradicating it. Id. at 593,604. The Court found that the university policy was a form of racial discrimination and upheld the *amicus'* position in support of the judgment below finding

the IRS policy was properly applied to Bob Jones University. Id. at 605.

Judicially-assigning unwilling bystanders to particular schools solely on the basis of their race is no less a form of racial discrimination than was the policy of Bob Jones University. Elements adding to the persuasiveness of this argument which were not present in the *Bob Jones* case, are that the racial discrimination here is to be imposed under court duress (1) by public officials (2) in a public school system (3) upon students of tender age whose attendance is compelled.

Racial assignments of unwilling Oklahoma City K-4 students violate *Brown's* legal premise, applying to them in 1985, today and tomorrow, as restated by Chief Justice Earl Warren in *The Memoirs of Earl Warren* (Doubleday, 1977) at pages 287-88:

"Again the Court was unanimous in its decision of May 31, 1955, reaffirming its earlier decision of May 17, 1954, by asserting the fundamental principle that **any kind** of racial discrimination in public education is unconstitutional, and that all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." (Emphasis by *Amici*.)

III. COURT-EXTENDED DISCRIMINATORY ASSIGNMENTS UNCONSTITUTIONALLY IMPAIR THE LIBERTY AND PRIVACY OF UNWILLING K-4 BYSTANDERS

"Any child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and privacy." Justice Powell, concurring, in *Keyes*, supra, 413 U.S. at 247.

For some thirteen years black students (in K-4 grades) and white students (in 5th grade) were assigned to schools for racial balance in Oklahoma City under the Finger plan until 1985 when the board allowed K-4 students to return to their neighborhood

schools. The appellate decision below would require resumption of K-4 racial school assignments of students, including nonconsenting, white bystanders, away from their neighborhood schools.

The law does not permit the courts to render the type of affirmative relief which injures and affects the interests of third parties not joined in the action. *Martin*, supra, 109 S.Ct. at 2185. Compare *Bank of California v. Superior Court*, 16 Cal.2d 516 (1940).

This Court may take judicial notice of the injury suffered by unwilling, affected students and their inability to individually intervene and continuously assert their constitutional rights. Nor are they required to. *Martin*, supra, 109 S.Ct. at 2185. This Court may consider their rights under the circumstances. Compare *Griswold*, supra, 381 U.S. at 481, and *Pierce*, supra, 268 U.S. 510.

Children are not mere creatures of the State. They are constitutionally protected from governmental action infringing upon their liberty and privacy. *Pierce*, supra, 268 U.S. at 535.

Mandatory racial assignments of five-to-ten-year-olds away from their home/neighborhood school environs are analogous to the assignments of seven-year-olds in ancient Sparta referred to in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In *Meyer*, this Court prevented Nebraska from prohibiting foreign-language instruction in its schools, making the point that a desirable end cannot be promoted by prohibited means by this analogy:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any

> Legislature could impose such restrctions upon the people of a state without doing violence to both letter and spirit of the Constitution." 262 U.S. at 402.

The Fifth Amendment provides that "no person shall be deprived of life, liberty, or property, without due process of law." This Court, in construing that clause, pointed out in *Bolling*, supra, 347 U.S.at 498, that discrimination "may be so unjustifiable as to be violative of due process." And racially assigning unwilling Oklahoma City students to particular elementary schools is as unjustifiable under the circumstances here as were the racial assignments of District of Columbia students in *Bolling*.

Unwilling bystanders racially reassigned by the judicial arm of the United States would suffer an impairment of liberty like that of the students in *Bolling*. They are entitled to a ruling of unconstitutionality such as the *Bolling* students received after a hearing. A fortiori, since the deprivation of liberty and privacy is sought to be imposed upon nonparty Oklahoma City students **without their being heard** as required by the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

For these reasons, the Intervenors opposed to judicially ordered assignment of students on a racial basis in *Carlin v. Board of Education, San Diego Unified School District*, as *amici curiae*, respectfully support the Petitioner and the neighborhood school plan.

Respectfully submitted,

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Dated: May 8, 1990

APPENDIX

STUDENTS

(Child, living in District, subject to busing, who can read and understand the statement below

TO THE BOARD OF EDUCATION, SAN DIEGO UNIFIED SCHOOL DISTRICT:

I, the undersigned child, residing in the San Diego Unified School District, respectfully object to school authorities making me, because of my race, go away from my neighborhood public school location to classes, without my consent and the consent of my parent(s), as a violation of my rights.

NAME	AGE	ADDRESS	DATE
Lisa C.	12	[illegible] 92124	Feb 19, 1981
Angie C.	10	"	Feb 19, 1981
Cheryl [illegible]	11	[illegible]	Feb 19, 81
Erin [illegible]	11	[illegible] 92124	Feb 19, 81
Karen [illegible]	11	[illegible] 92124	Feb 20, 81
Sandy [illegible]	11	92124	Feb 20, 81
Brent [illegible]	11	11 Lane 92124	Feb 20, 81
[illegible]	[illegible]	[illegible]	[illegible]
Stephan [illegible]	[illegible]	[illegible] 92124	Feb 20, 81
Ricky G.	12	[illegible]	Feb 23, 81
Krista F.	11	[illegible] 92124	Feb 23, 81
Jeri [illegible]	11	[illegible] 92124	Feb 23, 81
Lori [illegible]	11	[illegible] 92124	Feb 23, 81
Cheryl [illegible]	12	[illegible]	Feb 23, 81

Supreme Court, U.S.
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MAY 31 1990
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CLERK

No. 89-1080

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE DEKALB COUNTY BOARD OF EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus curiae will address the following questions:

1. Whether the legal standards for modification of antitrust decrees imposed upon private parties as enunciated in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), that a decree may be modified only upon a showing of "grievous harm" and that the dangers warranting an injunction have become "attenuated to a shadow" is the proper rule for modification of a school desegregation decree.

2. Whether under the Fourteenth Amendment a federal court may refuse to dissolve a school desegregation decree once local school authorities have established that the school system has become unitary and that there is no causal relationship between the prior constitutional violation and any current conditions in the school system.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-1080

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,
v.
ROBERT L. DOWELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE DEKALB COUNTY BOARD OF EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Board of Education of DeKalb County, Georgia, which has been operating the DeKalb County School System ("DCSS") under federal court supervision for over 20 years, was recently ordered by a panel of the Eleventh Circuit to "consider pairing and clustering of schools, drastic gerrymandering of school zones and . . . busing" in order to alleviate racial imbalances in student assignment that had been caused solely by shifting demographic (housing) patterns in the County occurring after an admittedly effective remedy had been instituted. See Appendix to Petition for a Writ of Certiorari, *Freeman*,

et al. v. *Pitts, et al.* ("*DeKalb* Pet. App."), No. 89-1290, at 23a. That order was issued despite the undisturbed finding of the district court that, with respect to student assignment:

> The DCSS has become a system in which the characteristics of the [former] dual system have been eradicated, or if they do exist, are not the result of past or present intentional segregative conduct by the defendants or their predecessors.

DeKalb Pet. App. 47a. Although the district court's finding as to the effectiveness of the remedy was not reversed, the Eleventh Circuit nevertheless overturned the district court's order ending federal court supervision of student assignment policies on the ground that the district court had applied too lenient a legal standard. See *DeKalb* Pet. App. 24a. Thus, the Eleventh Circuit's approach is congruent with the Tenth Circuit's decision under review in at least one crucial respect: both courts have held that a finding that the original constitutional violation has been remedied is not dispositive in determining whether to terminate federal intervention into the operations of local school systems.[1] Once the existence of a "dual"

[1] The Eleventh Circuit held that enforcement of the federal court desegregation order would continue until the school system simultaneously "maintains at least three years of racial equality in six categories: student assignment, faculty, staff, transportation, extracurricular activities and facilities." *DeKalb* Pet. App. 24a. Regardless of the "cause" of current racial imbalance or the effectiveness of the earlier remedial order in eradicating the original constitutional violation, the Eleventh Circuit made it clear that the DCSS "must take affirmative steps to gain and maintain a desegregated student population." *Id.* at 19a.

The Tenth Circuit in this case held that enforcement of the remedial decree would continue until the school system demonstrates " 'dramatic changes in conditions unforeseen at the time of the decree that both render the protections of the decree unnecessary . . . and impose extreme and unexpectedly oppressive hardships on the obligor.' " *Dowell II*, Pet. App. 12a (citation omitted). The Tenth Circuit, like the Eleventh, finds an affirmative obligation to maintain

school system has been established, both courts reject the need for a *continuing* causal link between the constitutional violation and the scope of an ongoing federally supervised remedy, in favor of a rule that focuses solely on the present condition (*i.e.*, racial balance) of the school system and requires amelioration of *de facto* conditions. See *DeKalb* Pet. App. 19a; *Dowell* v. *Board of Educ. of the Okla. City Pub. Schools* (*Dowell II*), 890 F.2d 1483, 1490-91 (10th Cir. 1989), Pet. App. 13a-15a.

Although DeKalb County's pending petition for certiorari, which is being held pending disposition of this case, presents somewhat different questions than those presented here, DeKalb County has a significant interest in the outcome of this case. See Petition for a Writ of Certiorari, *Freeman, et al.* v. *Pitts, et al.* ("*DeKalb* Pet."), No. 89-1290, at i. Both this case and *Freeman* v. *Pitts* focus on the fundamental questions of how to measure both "compliance" with desegregation orders and at what point formerly *de jure* segregated school systems have fulfilled their remedial obligations and should be relieved of federal court supervision. The Tenth and Eleventh Circuits both focus on achieving and maintaining the singleminded goal of complete racial balance in the public schools. Yet, in doing so, both courts lose sight of the fact that, in our federalist system, their remedial authority is bounded by the requirements of the Constitution and Our Federalism. *Amicus* DCSS submits that once a constitutional violation is remedied and the vestiges of the intentionally segregative dual system have been eliminated in any aspect of the school system (*e.g.*, student assignment), the proper federal rule returns that aspect of the school system to local control. *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976).

desegregated conditions (*id.* at 18a) that justifies an ongoing federal remedy even after the "condition" or violation on which the remedial order is based has been eliminated. *Id.* at 13a.

Racial integration is an important goal, and one that the DCSS has been committed voluntarily to pursuing. *DeKalb* Pet. 3-4. Nevertheless, day-to-day decisions on the allocation of scarce local resources are impaired when federal courts denigrate all other legitimate goals in favor of maintaining arbitrary standards of "racial balance." Both the Eleventh and Tenth Circuits have substituted the "goals" of a federal court decree for constitutional standards, thereby vastly expanding federal authority over petitioner, over the DCSS and over hundreds of similarly situated local school authorities. Because of the importance of the overlapping issues in this case and in the pending *DeKalb County* petition (No. 89-1290) and because the Court's decision in this case will affect the existing status of federal court supervision of the DCSS—either directly or indirectly—the DeKalb County School Board is filing this brief as *amicus curiae* in support of petitioner in this case.[2]

STATEMENT

Amicus DeKalb County School Board agrees with petitioner Board of Education of Oklahoma City's (the "Board's") statement of the case, but wishes to emphasize the following facts:

1. The case against petitioner was filed in 1961. *Dowell* v. *Board of Educ. of the Okla. City Pub. Schools* ("*Dowell I*"), 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). In 1972, the "district court ordered the implementation" of the remedial scheme at issue, which became known as the "Finger Plan." *Id.* at 1518. That order utilized "techniques of pairing, clustering, and compulsory busing" to achieve racial balance in student assignment. *Dowell* v. *Board of Educ. of the Okla. City Pub. Schools* ("*Dowell II*"), 890 F.2d 1483, 1486 (10th Cir. 1989), Pet. App. 4a.

[2] Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of the letters of consent from the parties have been filed with the Clerk of the Court.

Several years later, the district court held an evidentiary hearing on the Board's motion to close the case. Pet. App. 2b. Based on the evidence presented at that hearing, the district court in 1977 "relinquished jurisdiction over [the] case" because it was convinced that the desegregation plan had been fully carried out "and that the School District had reached the goal of being a desegregated non-racially operated and unitary school system." *Dowell* v. *Board of Educ. of the Okla. City Pub. Schools*, 606 F. Supp. 1548, 1554 (W.D. Okla. 1985); see *Dowell I*, 795 F.2d at 1518.

During the next eight years the Board continued voluntarily to operate the school system pursuant to the requirements of the Finger Plan, with minor alterations, even though the district court had declared the District unitary and terminated the case. In the 1984-1985 school year, however, the Board adopted a new student assignment plan (the "reassignment plan" or "plan"), which eliminated compulsory busing in grades 1 to 4 in favor of neighborhood schools. *Dowell II*, Pet. App. 4a.[3] In response, the plaintiffs moved the district court to "reopen the case," arguing that the Board had wrongfully deviated from the Finger Plan.

After a hearing, the district court found that the principles of res judicata precluded the plaintiffs from challenging the 1977 finding that the school system had "reached the goal of being a desegregated non-racially operated and unitary school system." *Dowell* v. *Board*

[3] The reassignment plan continued to maintain racial balance in all other grades through mandatory busing. In addition, the plan included a "majority to minority" transfer option that permitted elementary students (grades 1-4) in a school in which they were in the majority race to transfer to a school in which they were in the minority. See *Dowell II*, Pet. App. 4a-5a. The district court found that the change in the assignment plan was a response to shifting housing patterns and the resultant increased busing burden (in time and distance) on young black children. *Dowell* v. *Board of Educ. of the Okla. City Pub. Schools*, 606 F. Supp. 1548, 1552 (W.D. Okla. 1985).

of Educ. of the Okla. City Pub. Schools, 606 F. Supp. at 1554. In addition, the district court found that the school system in 1985 continued to operate and function as a non-discriminatory unitary system (*id.* at 1555) and that the reassignment plan was "constitutional"—*i.e.*, that the plan was adopted without any discriminatory intent. *Id.* at 1556. Thus, the district court concluded that there were no "special circumstances" that warranted reopening the case. See *Dowell I*, 795 F.2d at 1518.

2. The court of appeals reversed, holding that the district court had erred in refusing to reopen the case for the purpose of permitting the plaintiffs to "enforce" the provisions of the original remedial order. *Dowell II*, Pet. App. 5a-6a. The key to the court of appeals' decision was its holding that the 1977 finding of unitariness did not affect the continuing vitality of the "mandatory injunction" (*i.e.*, the remedial order), and thus, "the plaintiffs . . . only have the burden of showing that the court's mandatory injunction has been violated." *Id.* at 6a; see *Dowell I*, 795 F.2d at 1519. In so holding, the court of appeals specifically rejected the United States' argument that "once a finding of unitariness is entered, all authority over the affairs of a school district is returned to its governing board, and all prior court orders, including any remedial busing order are terminated." *Dowell I*, 795 F.2d at 1520. In the Tenth Circuit's view, a finding of "unitariness" relates only to the "ministerial function of 'closing' a case" and terminating active (*i.e.*, day-to-day) supervision of school operations. *Id.* The achievement of unitary status in no way affects a school board's continuing obligation strictly to comply with the "prospective operation" of the federal court's remedial order. *Id.*[4]

[4] The court explained that this "standard" for modifying or terminating local school board obligations under federal desegregation decrees is the same legal standard "applicable in all instances where . . . the relief sought is escape from the impact of an injunction." *Id.* (citations omitted).

In sum, the Tenth Circuit found that proof that a desegregation decree had successfully achieved its goal of eliminating discrimination root and branch was not a sufficient basis to dissolve an injunction. Instead, a school board must show that retaining the injunction imposes " 'hardship so extreme and unexpected' as to make the decree oppressive." *Dowell I*, 795 F.2d at 1521. The plaintiffs' only "burden" was to demonstrate that the School Board had deviated from the requirements of the Finger Plan (*Dowell I*, 795 F.2d at 1523); according to the court of appeals, such a showing "constitutes the 'special circumstances' " that justify "reopening" the case under Fed. R. Civ. P. 60(b). *Dowell I*, 795 F.2d at 1522. The court of appeals thus remanded the case to the district court to test the School Board's evidence against the appropriate standard.

3. The district court noted initially that there had been substantial changes in housing patterns that had created the need to modify the Finger Plan. See Pet. App. 19b. However, because residential segregation in certain neighborhoods was the cause for "the predominately black elementary schools" under the new plan, the court addressed whether those patterns of residential segregation could be linked to any unconstitutional action on the part of the Board. *Id.* After reviewing all of the evidence, the district court concluded that the Board had "taken absolutely no action which has caused or contributed to" segregated housing patterns (and, thus segregated neighborhood schools) in certain neighborhoods; in fact, the Board's actions over the past decade had "fostered the neighborhood integration which has occurred in Oklahoma City." Pet. App. 17b-18b.

On remand, the district court addressed the "fundamental issue" whether the "School Board has shown a substantial change in conditions warranting dissolution or modification of the 1972 Order." Pet. App. 5b. The district court determined that the "demographic changes" at issue had created hardship and rendered aspects of

the Finger Plan "oppressive" in a way that would justify modification or dissolution of the injunction. Pet. App. 23b. The district court also held that the reassignment plan, adopted in response to the changes in question, was approved for legitimate, non-discriminatory reasons and that the plan would not disturb the unitary status of the school system—a status that had been maintained "from 1977 to the present." Pet. App. 24b-33b.

Finally, the district court addressed the issue whether the 1972 desegregation decree, which adopted the Finger Plan, should be modified or dissolved. Pet. App. 33b. In considering whether changed conditions warranted modification or dissolution of the decree, the court focused on the issue of whether the purposes of the decree have been "fully achieved." Pet. App. 35b. The district court stated that "[t]he purpose of a desegregation remedy is to 'correct' the condition that offends the Constitution" (Pet. App. 36b), in particular, to "dismantle[] the dual school system." *Id.* In this case, the dual system had been dismantled and "all vestiges of prior state-imposed segregation had been completely removed" from the school system by 1977. Pet. App. 38b, 36b. The plaintiffs' focus on curing racial imbalance in student assignment due to residential segregation—for which the Board was not responsible (Pet. App. 36b)—was an attempt to achieve a remedy "aimed at eliminating a condition that does not violate the Constitution." *Id.* (citation omitted). Thus, the achievement of unitary status, together with the demographic shifts that rendered continued conformity with the Finger Plan "oppressive," was held to be sufficient to support dissolution of the 1972 decree. Pet. App. 39b.

4. A divided panel of the court of appeals again reversed. The court reiterated that modification or dissolution of the decree requires a showing under the standard in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), that there has been a change in "conditions" that "both render the protections of the decree unnecessary to effectuate the rights of the beneficiary and impose extreme and unexpectedly oppressive hardships on the obligor." *Dowell II*, Pet. App. 12a. However, the court held that the "condition" that occurs as a result of the injunction (*i.e.*, the achievement of unitary status) "cannot alone become the basis for altering the decree . . . ." *Id.* at 13a.[5] In addition to "a finding of unitariness", the Board would have to produce "proof of a substantial change in the circumstances which led to the issuance of that decree." *Id.* at 16a. On review of the evidence, the court conceded that "changed circumstances" had been established (*id.* at 19a-20a) that supported modification of the Finger Plan. *Id.* at 30a.

The court then turned to the issue of whether the court below had erred in vacating the decree (rather than modifying it). According to the court of appeals, it appeared that the Board's reassignment plan "has the effect of making the District 'un-unitary' by reviving the effects of past discrimination." *Dowell II*, Pet. App. 31a. The court made clear that in judging the "effectiveness [of the Board's modification of the decree] in maintaining unitary status" (*id.* at 40a), it was measuring the "plan" solely in terms of its *effects* on racial balance in the school system and not in terms of its relationship to any unconstitutional conduct on the part of the Board:

> we must focus not on whether the Plan is nondiscriminatory but on whether it solves the problems created by the changed conditions in the District.

Id. at 41a. Here, the panel was "troubled because the evidence indicates the Board's implementation of a 'racially neutral' neighborhood assignment plan has had the

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[5] According to the Tenth Circuit, unitariness—defined as a "state of successful desegregation"—simply does not "mandate the later dissolution of the decree without proof of a substantial change in the circumstances which led to the issuance of that decree." Pet. App. 16a.

effect of reviving those conditions that necessitated a remedy in the first instance." *Id.* at 32a. Thus, the court vacated the district court's judgment dissolving the 1972 decree and remanded for consideration of modifications to the Finger Plan that would "maintain racially balanced elementary schools within the framework of changed circumstances that have occurred in the District." *Id.* at 44a-45a.

SUMMARY OF ARGUMENT

I.

The Tenth Circuit assumes without justification that the law applicable to prohibitory antitrust injunctions governs the decision whether to terminate a federal court's remedial decree in a school desegregation case. There can be no doubt that traditional equitable principles inform a federal court's approach in fashioning a remedy for a constitutional violation by state authorities. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971). But it does not follow from this that the injunction standards applied to private antitrust defendants should be applied uncritically to a public school board. See *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). Because the question whether a specific injunction may be modified is anchored to the substantive law justifying the imposition of the original remedy, the proper federal rule for modifying injunctive relief must refer to that substantive law.

The law governing the allocation of private economic rights in antitrust decrees is inapposite to the determination of the appropriate remedy imposed upon state and local authorities for the purpose of curing the effects of past equal protection violations. Antitrust decrees rarely are subject to modification because they operate to prevent ongoing threatened violations. By contrast, school desegregation decrees focus primarily on

the purpose of providing interim remedial relief. The decrees remedying Fourteenth Amendment violations that govern local educational policy are entered in contemplation of their termination once the school authorities have cured the effects of the prior constitutional violation. At that point, the federal court must relinquish control over the school system by dissolving the injunction.

II.

A. A federal court has authority to order injunctive relief in a school desegregation case only to the extent of a proven violation of the Equal Protection Clause of the Fourteenth Amendment. In the development of this substantive rule, this Court has long applied the traditional equitable principle that "the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16; *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*). The rationale for the limits upon the federal judiciary's powers to remedy effects from conduct of state authorities is bounded by the Constitution and Our Federalism. By requiring petitioners to perpetuate a judicially imposed racial balance in the school system after a finding of unitariness, the court of appeals ignored the principle that the federal judiciary may not regulate the activities of state and local authorities absent a constitutional violation. *Spangler*, 427 U.S. at 434.

B. The substantive law—the Equal Protection Clause in this context—provides both the source and the limits of a federal court's power to impose remedial injunctive relief upon state and local school authorities. According to the traditional equitable principles, "a decree may be changed upon an appropriate showing." *United Shoe Machinery Corp.*, 391 U.S. at 248. The district court properly found that petitioner had made the appropriate showing in this school desegregation case.

Under the substantive law that has evolved in school desegregation jurisprudence, such decrees may be imple-

mented only to remedy segregative effects that are causally linked to racially discriminatory actions of state or local authorities. *Spangler*, 427 U.S. at 434. This Court's decision in *Spangler* makes clear that a federal court must dissolve an injunctive decree in a school desegregation context once the purposes of the decree have been achieved and there has been a finding that there is no causal nexus between any segregated condition in the school system and the prior constitutional violation. By defining the goal of the injunction to remedy conditions beyond the scope of the violation and thus beyond a federal court's power, the court of appeals erred in refusing to dissolve the decree.

ARGUMENT

The Tenth Circuit's holding is premised on its belief, expressed in *Dowell I*, that a desegregation order, once implemented, remains binding on a school system until such time as the school system satisfies the "difficult" and "severe" burden of demonstrating that because of a "substantial change in law or facts" the order has produced "'hardship so extreme and unexpected' as to make the decree oppressive." *Dowell I*, 795 F.2d at 1521. In other words, public school boards are to be treated no different than meat packing companies. Such a rule will severely impair current desegregation efforts of many school boards by removing the major incentive to achieve unitary status. Moreover, if that is indeed the rule for school desegregation cases, then the Tenth Circuit's doctrine signals a watershed change—and a severe deterioration—in federal-state relations.

I. THE COURT BELOW ERRED IN INCORPORATING STANDARDS FROM ANTITRUST LAW TO DETERMINE WHETHER TO MODIFY OR VACATE AN INJUNCTION IN A SCHOOL DESEGREGATION CASE.

As in any other case involving the modification or dissolution of injunctive decrees, this case requires "the proper application of the federal law on injunctive remedies." *Dowell II*, Pet. App. 3a. This Court has held that a "school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of *a constitutional right*." *Swann*, 402 U.S. at 15-16 (emphasis added); see also *Hills* v. *Gatreaux*, 425 U.S. 284, 294 n.11 (1976); *Milliken I*, 418 U.S. at 744.[6] For that reason, some of the basic principles that cabin a federal court's authority to modify injunctive relief apply equally to any request to modify a desegregation decree. But it does not follow that the defendant's status as a public entity is irrelevant to the basic question of how long a decree must remain in effect. As applied in the context of school desegregation cases, the rules on federal injunctions do not require decrees against local school authorities to exist in virtual perpetuity. Since *Green* v. *County School Bd.*, 391 U.S. 430 (1968), it has been clear that such decrees were intended to be terminated at the appropriate time: when the school system has achieved unitary status. *Cf. Swann*, 402 U.S. at 28 (discussing the nature of the remedy to be imposed in the "interim period" until the effects of a dual system are eliminated).

It is well established that "an injunction often requires continuing supervision by the issuing court," *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 647 (1961), and thus the issuing court may modify or dissolve an injunctive decree when "it is no longer equitable that the judgment shall have prospective application." Fed. R. Civ. P. 60(b)(5); see *United Shoe Machinery Corp.*, 391 U.S. at 248; *Wright*, 364 U.S. at 646-48; *United States* v. *Swift*

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[6] See *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976) (district court exceeded authority by requiring annual readjustment of attendance zones); *cf. Milliken* v. *Bradley*, 418 U.S. 717 (1974) (district court exceeded its authority by ordering interdistrict remedy); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (district court had remedial authority to decree system of bus transportation and use mathematical ratios as starting point).

& *Co.*, 286 U.S. 106, 114 (1932); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). "'[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.'" *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 437 (1976) (quoting *System Fed'n No. 91* v. *Wright*, 364 U.S. at 647). Because prospective injunctions are issued in a variety of differing contexts,[7] the determination whether an injunction should be modified or dissolved "must be based upon the specific facts and circumstances" of the particular case. *United Shoe Machinery Corp.*, 391 U.S. at 249.

Most important, the determination whether to vacate or modify a decree must be made in light of the substantive law upon which the decree was based. A court's authority to enter an injunctive decree is necessarily derived from the substantive law "which the decree is intended to enforce." *System Fed'n No. 91* v. *Wright*, 364 U.S. at 651; see *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 241 (1982). In *Wright*, for example, the Court held that the district court erred in refusing to modify a consent decree under the Railway Labor Act in response to a change in the underlying substantive law.[8] When Congress had

[7] See, *e.g.*, *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968) (unlawful monopoly in shoe machinery market); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942) (unlawful affiliation of automobile manufacturer and finance company); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984) (discrimination in city employment).

[8] A consent decree, like a litigated decree, may be modified upon the proper showing of changed circumstances. See *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 650-51 (1961). While the particular substantive law may allow additional relief under a consent decree, "the court's *exercise* of the power to modify the decree over the objection of a party to the decree does implicate" the limits imposed by the substantive law. *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 523 n.12 (1986) (original emphasis); see also *id.* at 526-28 (consent decree must be consistent with underlying substantive-law basis for decree).

amended the Act to legalize one of the practices prohibited by the decree, the Court made clear that the decree should have been modified so that its terms would not "conflict with statutory objectives." *Id.*; see also *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) at 429-32 (subsequent congressional action legalizing bridge position required modification of injunction to remove the bridge); *cf. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 576 n.9 (1984) (modification of consent decree permitted only to extent it would be consistent with Title VII). Only by referring to the substantive law that formed the basis of the original decree may a court ensure that its order remains consistent with its original purpose. See *United Shoe Machinery Corp.*, 391 U.S. at 251-252 (cases interpreting the Sherman Act define the purposes of the antitrust injunction).

Because the underlying substantive law is an essential check on a federal court's power to issue and modify injunctions, the heavy reliance of the court below on the substantive standards for modification of antitrust decrees was in error. The purposes of antitrust decrees are to enjoin continuing and threatened violations by private entities, to cure past violations and to deprive the defendants of any economic benefits from their past unlawful acts. See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 187-89 (1944); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577-78 (1966). A prohibitory antitrust decree such as that in *Swift* is particularly likely to be impervious to modification because it is properly assumed that the defendants will continue to act in their economic self-interest and thus will not resist the temptation to reap anti-competitive benefits, as long as market conditions permit such conduct. See *United States* v. *Glaxo*

Group, Ltd., 410 U.S. 52, 63 (1973); *Crescent Amusement Co.*, 323 U.S. at 190; see also *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950). Given the threat that, absent the injunction, the defendant will resume the anti-competitive conduct, a scheme of permanent mandatory relief is likely to be necessary to achieve the purposes of the antitrust laws.

The standard for modifying the antitrust decree in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932)—which is the cornerstone of the decision below—incorporates this concern for the ongoing threat of violation. In *Swift*, the defendants sought a significant modification of a 1920 consent decree which had imposed restraints on the meat packers who had created "an unlawful monopoly of a large part of the food supply of the nation." 286 U.S. at 111.[9] In considering the requested modification, the Court noted a distinction "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Id.* at 114. The *Swift* injunction fell within the former category because of the continuing threat of defendants' monopolistic power that was "one of the chief reasons" for the original injunction. *Id.* at 115. The Court concluded that any changes in the meat market that may have occurred were insignificant to affect "the old-time abuses in the sale of other foods," and that the market power wielded by the meat packers was a "substantially unchanged" fact. *Id.* at 117. Therefore, because the purposes of the original decree had not been fully achieved and the conduct which led to the decree was still threatened, the defendants had failed to demonstrate that the decree should be modified. *Id.* at 116-120.[10]

[9] Before the request for modification, two prior "vigorous assault[s]" upon the decree were heard by this Court in *Swift & Co.* v. *United States*, 276 U.S. 311 (1928) and *United States* v. *California Coop. Canneries*, 279 U.S. 553 (1929). *Swift*, 286 U.S. at 113. The third suit attacking the decree was styled as a petition "to modify the consent decree and to adapt its restraints to the needs of a new day." *Id.*

Contrary to the opinion of the court of appeals in this case (*Dowell II*, Pet. App. 12a (quoting *Swift*, 286 U.S. at 119)), the burden of proof applied in *Swift*—the requirement to show unforeseen conditions giving rise to grievous harm and the disappearance of the dangers addressed by the decree—cannot be applied across the board to all requests to modify or dissolve an injunctive decree.[11]

[10] The Court made clear that the meat packers had sought to modify the injunction while there was strong reason to believe that the defendants would violate the antitrust laws if the restraints were alleviated. See 286 U.S. at 117-119. Because defendants had failed to make a showing that the threats of anticompetitive conduct "have become attenuated to a shadow" (*id.* at 119), the Court held that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Id.* The decision makes clear that in order to achieve the purposes of the antitrust laws, otherwise lawful business practices may be enjoined as long as the defendants are in a position to abuse their market power, absent the injunction. See *id.* at 116-17. When this Court's refusal to modify the antitrust decree in *Swift* is therefore "read in light of th[e] context" of the continuing threat of unlawful restraints of trade that existed in that case (*United Shoe Machinery Corp.*, 391 U.S. at 248), it is clear that the strict requirement of "a clear showing of grievous wrong evoked by new and unforeseen conditions" (*Swift*, 286 U.S. at 119), should not apply to modification of injunctions governing education policy—at least where the original violation has been cured.

[11] The court of appeals incorrectly stated that Rule 60(b)(5) "codifies" this statement in *Swift*. *Dowell II*, Pet. App. 13a. For two reasons, it is clear that Rule 60(b)(5) does not codify the strict standard applied in *Swift*. First, Rule 60(b) simply codifies the *procedure* for moving to modify an injunction; for example, it "does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings

Instead of announcing an absolute standard for modifying all federal injunctions, *Swift* simply "holds that [a decree] may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved." *United Shoe Machinery Corp.*, 391 U.S. at 248.[12]

Such a standard is particularly inappropriate in the school desegregation context, where the purpose of the injunction has been met and intentional (*de jure*) segregation and the effects of past intentional segregation have been eliminated.[13] See *infra* pages 24-28; *Columbus Bd.*

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to obtain relief." Fed. R. Civ. P. 60, Notes of Advisory Comm. on 1946 Amendment. Second, Rule 60(b) could not impose upon all types of injunctions the rule applied to an antitrust decree, such as in *Swift*, because such a rule would ignore the substantive law underlying the decree. See *supra* pages 13-17; *cf. Stotts*, 467 U.S. at 576 n.9 (disputed modification "cannot be resolved solely by reference to the terms of the decree and notions of equity").

[12] According to the court of appeals, under the *Swift* standard a school board must show that the changed conditions were unforeseen and have created oppression. *Dowell II*, Pet. App. 12a. But the nature of the school desegregation decree itself renders these prongs an inappropriate basis for decision. First, changed conditions are inherently foreseeable in every desegregation case because from the outset the decree envisions a day when it will end: each decree anticipates that federal-court intervention will cease and local autonomy will return when the vestiges of unlawful discrimination are eliminated root and branch. See *Green* v. *County School Bd.*, 391 U.S. 430 (1968). Second, oppression in its most basic sense occurs when a federal court continues to control the day-to-day operation of a public school system that has already achieved full unitary status.

[13] Reliance upon the standard for modification or dissolution of injunctive relief applied in antitrust cases against a private defendant is particularly inappropriate in a school desegregation case. Even under the antitrust laws, a state actor, such as a school board, has its conduct judged with regard to "principles of federalism and state sovereignty." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985). Thus, even if this were an antitrust case against a public school system, it seems quite unlikely that the extreme standards embodied in *Swift* would control. Accordingly, it makes no sense to employ those requirements rigidly in such a completely different legal setting.

of Educ. v. *Penick*, 443 U.S. 449, 458-59 (1979); *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977); (*"Milliken II"*); *Spangler*, 427 U.S. at 435; *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 200-201 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971). That determination of whether a school system has become unitary is extremely fact-specific and a matter committed in large measure to the fact-finding of the district courts supervising the decree that are "uniquely situated . . . to appraise the societal forces at work in the communities where they sit." *Penick, supra*, 443 U.S. at 469-71 (Stewart, J., concurring in *Penick* and dissenting in *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526 (1979) (*"Dayton II"*)); see also *Brown* v. *Board of Educ.*, 347 U.S. 483, 495 (1954). But, at least, where such a finding of unitariness has been entered (*Dowell*, 677 F. Supp. 1503, 1506 (W.D. Okla. 1987), Pet. App. 56), it is clearly impermissible to enjoin a school system to continue operating under the same federal court injunction that was entered in response to a finding of unlawful *de jure* segregation, which, by definition, has been fully remedied. See *infra* pages 25-27.

The purpose of the decree in *Swift* was to prohibit threatened conduct.[14] The purpose of all desegregation decrees is to reach the point where they are no longer needed—the elimination of the old dual system and its effects "root and branch." *Green* v. *County School Bd.*, 391 U.S. 430, 438 (1968). That point—unitary status—means that the decrees have *fully* served their purpose. To con-

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[14] There is no suggestion in the decisions of the court of appeals and the district court that absent a federal injunctive restraint, local authorities would return to a *de jure* segregated school system. See *Dowell*, 677 F. Supp. 1503, 1515-16, 1519 (W.D. Okla. 1987) (Pet. App. 24b-25b, 31b-33b); *Dowell II*, Pet. App. 41a.

tinue these decrees after this point in time is a groundless incursion of federal power in local affairs.

II. THE DEMANDS OF THE EQUAL PROTECTION CLAUSE PROVIDE THE PROPER RULE FOR DETERMINING WHETHER AN INJUNCTIVE DECREE AGAINST LOCAL SCHOOL AUTHORITIES SHOULD BE CONTINUED.

The scope of a federal court's equitable power does not expand or change depending upon the stage in the life of a case in which that power is exercised. Thus, the determination whether an injunctive remedy should be modified or vacated is bounded by the same substantive law that defines the scope of the initial remedy: "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

Where the plaintiffs have established that state or local authorities have violated the Fourteenth Amendment through intentional discrimination on the basis of race, a federal court's "equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies," *id.* at 15, but the court may exercise this remedial power "only on the basis of a constitutional violation." *Id.* at 16.[15] Thus—regardless of the prior status of the school district or the "goals" of any existing order—federal court "decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Milliken II*, 433 U.S. at 282; see also *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419-20 (1977) ("*Dayton I*"); *Milliken I*, 418 U.S. at 738; *cf. General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 399 (1982) (judicial remedial powers "extend no farther than required by the nature and the extent of th[e] violation"); *Hills* v. *Gatreaux*, 425 U.S. 284, 293-94 (1976); *Rizzo* v. *Goode*, 423 U.S. 362, 378 (1976).

[15] See also *Spangler*, 427 U.S. at 443 (Marshall, J., dissenting) (federal court has broad discretion to fashion remedial relief "*until* such a unitary system is established") (quoting *Swann*, 402 U.S. at 31-32) (emphasis added).

In *Milliken I*, for example, this Court held that the district court exceeded its remedial equitable powers by ordering a desegregation remedy that extended beyond the City of Detroit into the neighboring school districts. This interdistrict remedy "was held to be an impermissible remedy . . . because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation." *Hills v. Gatreaux*, 425 U.S. at 296; *Milliken I*, 418 U.S. at 744-45; *Swann*, 402 U.S. at 16. Thus, at the very least, it is well established that "a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Gatreaux*, 425 U.S. at 293-94 (quoting *Milliken I*, 418 U.S. at 744). The decision below is contrary to this fundamental axiom.

A. A Federal Court's Equitable Discretion To Impose, Modify Or Vacate An Injunction Structuring The Operations Of Local School Districts Must Be Informed By The Respect For Local Autonomy Embodied In Our Federalism.

The decision of the court of appeals is admittedly aimed at maintaining racially balanced student populations, even though the imbalance which exists if a race-neutral neighborhood assignment method is instituted cannot be traced to any unconstitutional conduct. The court of appeals simply disagrees with the decision of the local authorities who desire, for otherwise legitimate reasons, to make the change. The racial balance that the court of appeals has ordered maintained perpetually is not necessary as "an interim corrective measure" (*Swann*, 402 U.S. at 27); rather, it simply reflects the court's preference for racially balanced schools. Yet, unless used in a "corrective" way, such a judgment invades a province heretofore exclusively belonging to the states.

It is certainly arguable that Congress, exercising its power to legislate under section 5 of the Fourteenth Amendment (U.S. Const. amend. XIV, § 5), could make this judgment over state objections, but Congress has already spoken to the issue and agrees with the Oklahoma City Board of Education.

> The Congress declares it to be the policy of the United States that—— . . . (2) the neighborhood is the appropriate basis for determining public school assignments.

20 U.S.C. § 1701(a)(2).

In both *Milliken I* and *Gatreaux*, this Court acknowledged concern that a federal court's injunction restructuring local government operations in response to a finding of a constitutional violation should be sensitive to the constitutionally mandated federal-state relationship. See, *e.g.*, *Gatreaux*, 425 U.S. at 294. Because a federal court's decision to enter or sustain a desegregation order displaces the "vital national tradition" of "local autonomy of school districts," the exercise of these powers is bounded by constitutional principles of federalism. *Dayton I*, 433 U.S. at 410; *Milliken I*, 418 U.S. at 744-45; see also *Spangler*, 427 U.S. at 434-35; *Swann*, 402 U.S. at 15-16; *cf. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 576-77 n.9 (1984). The court of appeals in this case, by importing standards for modification of wholly *private* remedies, simply ignored such considerations.

While this Court has never directly set forth the framework for modifying injunctions issued to reform state institutions, lower courts that must "grapple with the flinty, intractable realities of day-to-day implementation of th[e] constitutional commands" (*Swann*, 402 U.S. at 6), have long noted the need for flexibility in modifying injunctions that structurally reform state programs. In contrast, injunctions that allocate economic rights among private parties (including, for example,

the antitrust injunction in *Swift*) do not implicate such federalism concerns. Indeed, this Court recognized this very distinction in *United States* v. *Swift & Co.*, 286 U.S. at 114.[16]

A federal court in determining whether a decree should be dissolved "must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo* v. *Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951)); see also *Milliken II*, 433 U.S. at 280-81. When equity jurisdiction to fashion injunctive remedies is vested in "a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo* v. *Goode*, 423 U.S. at 379 (citing *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 928 (1975)).[17] Appropriate recog-

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[16] The courts of appeals also have noted this distinction in their review of modification of injunctions. See, *e.g.*, *Money Store, Inc.* v. *Harriscorp Finance, Inc.*, 885 F.2d 369, 374-377 (7th Cir. 1989) (Posner, J., concurring); *Kozlowski* v. *Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989); *Twelve John Does* v. *District of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988); *Badgley* v. *Santacroce*, 853 F.2d 50, 52-53 (2d Cir. 1988); *Plyler* v. *Evatt*, 846 F.2d 208, 212 (4th Cir.), *cert. denied*, 109 S.Ct. 241 (1988); *Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987); *Duran* v. *Elrod*, 760 F.2d 756, 758 (7th Cir. 1985); *Newman* v. *Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984); *Nelson* v. *Collins*, 659 F.2d 420, 424 (4th Cir. 1981); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 967-71 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); see also *Spangler* v. *Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, Circuit Judge, concurring).

[17] The Court recently reaffirmed that "one of the most important considerations governing the exercise of equitable power is proper respect for the integrity and function of local government institutions." *Missouri* v. *Jenkins*, 58 U.S.L.W. 4480, 4484 (1990); see also *Spallone* v. *United States*, 110 S.Ct. 625, 632 (1990) ("'[t]he

nition of such federalism concerns precludes consideration of requests to modify a desegregation decree under a legal standard that presumes that the original injunction will be permanent. See *supra* pages 16-20 and note 12.

B. A Federal Court's Authority To Continue A School Desegregation Decree Terminates When It Is Established That Intentional Segregation Has Ceased And Current Conditions Are Not Attributable To Prior Segregative Acts.

To justify the decree of injunctive relief, "it must be shown that racially discriminatory acts of the state or local school districts . . . have been a substantial *cause* of [the] segregation." *Milliken I*, 418 U.S. at 745 (emphasis added); see also *Spangler*, 427 U.S. at 434 (plaintiff must establish that "school authorities have in some manner caused unconstitutional segregation"). Moreover, when a violation of equal protection is alleged, a plaintiff must establish that the state action which is being challenged was adopted with a discriminatory purpose. *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 203 (1973); *Washington* v. *Davis*, 426 U.S. 229, 239-41 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-66 (1977).

These principles are essentially embodied and applied in *Spangler*. In *Spangler*, the Court reversed the refusal of the district court to vacate a portion of an injunctive decree after that decree had succeeded in remedying completely the student assignment portion of the violation previously found. Even though the Pasadena Unified School District had not yet achieved complete unitary

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federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution' ") (quoting *Milliken II*, 433 U.S. at 280-81).

status,[18] the Court held that absent a finding that the racial imbalance to which the decree was addressed "[w]as in any manner caused by segregative actions chargeable to the defendants," 427 U.S. at 435, there could be no basis for "judicially ordering assignment of students on a racial basis." *Id.* at 434; see also *Swann*, 402 U.S. at 28 ("[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis").[19]

There is no principled way to reconcile the holding in *Spangler* with the refusal of the court of appeals in this case to vacate an injunction which requires assignment of students on a racial basis in a school district which the district court had found to have completed fully the remedial process. *Spangler* stands squarely for the proposition that parts of a remedial decree in school desegregation cases not aimed at remedying conditions causally

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[18] *Spangler*, 427 U.S. at 436. The Pasadena Unified School District was not declared to have attained complete unitary status until 1979. *Spangler* v. *Pasadena City Bd. of Educ.*, 611 F.2d 1239 (9th Cir. 1979).

[19] In addition to the rule set forth in *Swann* and *Spangler*, this Court's standing doctrines provide a useful guide to the necessary causal nexus between the constitutional violation and the scope of a federal court's equitable power. Both the standing inquiry and the "scope of remedy" analysis involve questions about causation and its relationship to the question of a federal court's power. See *Allen* v. *Wright*, 468 U.S. 737, 760 (1984) (whether a party is entitled to injunctive relief is closely related to "[c]ase-or-controversy considerations"). In order to invoke a federal court's jurisdiction to seek relief for an alleged injury, a plaintiff must demonstrate (1) that the alleged injury "fairly can be traced to the challenged action" and (2) that the alleged injury is "likely to be redressed" by the requested relief. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). A similar inquiry should guide requests for modification of injunctive relief; once the injunctive relief can no longer be "fairly traced" to an injury attributable to a constitutional violation, then the injunction should be lifted.

connected to unconstitutional conduct exceed the power of federal courts and must be vacated. The decision below violates the holding in *Spangler* because it orders indefinite compliance with just such a decree.

In this case, the causal relationship between the school authorities' unconstitutional conduct and the segregative effects were established in 1972. As the party moving for modification, the school authorities have a "burden . . . to satisfy the court that their [current] racial composition is not the result of present or past discriminatory action on their part." See *Swann*, 402 U.S. at 26; *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. at 211 n.17 (school authorities' burden "to show that current segregation is in no way the result of these past segregative actions"). When this burden is met, however, school authorities have no further "duty" to remedy a lack of racial balance due to demographic or other factors and the injunction should be lifted. See *Spangler*, 427 U.S. at 436 (once the goal of the remedy is met, federal court may not require annual adjustments "to ensure that the racial mix desired by the court was maintained in perpetuity"); *Swann*, 402 U.S. at 28 "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis"). Applying this standard, the district court found that the constitutional violation had been cured over ten years ago and that the break in the causal link between the violation and current conditions was well established.

In light of such findings, the district court quite properly held that further equitable relief could be imposed only upon proof of a further constitutional violation. By reversing that holding in favor of a more expansive view of the Board's "duty," the Tenth Circuit erroneously expanded the desegregation remedy beyond the scope of the violation. As the Fifth Circuit correctly noted in *United States* v. *Overton*,

> continuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the Constitution and, of course, they are not interchangeable.

834 F.2d 1171, 1176 (5th Cir. 1987).[20] In ordering the school board to remedy the lack of racial balance caused by demographic changes, the Tenth Circuit has done exactly what the Fifth Circuit warned against: it has substituted racial balance rather than the "undoing" of unlawful segregation as the baseline of the remedial order.[21]

In sum, the fundamental error of the court of appeals in this case—and of the Eleventh Circuit in *Freeman* v. *Pitts*—was to measure current conditions in the schools against a standard or "goal" that was not closely tied to the scope of the substantive violation, as defined by the Constitution. The court of appeals' rejection of any requirement of a causal link between the condition being remedied and a violation of the Constitution (as was advocated by the United States, see *Dowell I*, 795 F.2d

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[20] The Fifth Circuit stated that the desire to press for remedies beyond the segregation caused by the constitutional violation "rests upon a fear that the Fourteenth Amendment, proscribing as it does only purposeful discrimination, inadequately protects desegregation gains . . . ." *Overton*, 834 F.2d at 1176.

[21] Despite the understandable desire of the court below to "protect" the goal of a racially balanced student body,

> accommodation of federal superintendence and federalism will not tolerate the idea that although the wrong is righted, the magnitude of the past wrong nonetheless justifies perpetuation of a federal order limiting the ambit of a school district's self-governance.

Overton, 834 F.2d at 1177. The standard adopted by the court below simply fails to recognize that "[i]t is state government that [the court was] asked to enjoin" and that, "having righted the wrong, the limits [the court should] impose on the state can be drawn no more tightly than the limits of the Constitution." *Id.*

at 1520) opens the door to virtually limitless remedial litigation in which local governments will be ordered to undertake extraordinary remedies in pursuit of a "perfect" racially-balanced school system—a "solution that may be unattainable in the context of the demographic, geographic, and sociological complexities of modern urban communities." *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 448 (1980) (Powell, J., dissenting). Because such a result is contrary to the requirements of the Constitution and contrary to fundamental equitable principles, the decision below must be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

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October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT No. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF THE LANDMARK LEGAL FOUNDATION CENTER FOR CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF THE LANDMARK LEGAL FOUNDATION CENTER FOR CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core principles of civil rights: equality under law and individual liberty.

A vital aspect of this mission is the pursuit of equal educational opportunities. We represent parents, schoolchildren, and teachers in a variety of cases raising issues of equal educational opportunities and educational choice.

We are joined as co-counsel by a number of distinguished law professors who share our conviction that the decision under review in this case is incompatible with fundamental principles of justice and with sound public policy.

SUMMARY OF ARGUMENT

In a very real sense, the appearance of this case and others like it[1] before this Court is a cause for celebration – specifically, a celebration of the triumph of our nation's most cherished principles. These cases mark an important epoch in America's quest to make good on its commitment to civil rights, for they present the question not of how to remedy discriminatory educational systems, but rather what happens when that task is accomplished.

This case does not require the Court to make new law, but merely to apply well-established equitable principles. The dispositive principle in this case is that the

[1] The three other cases pending on petitions for writs of *certiorari* include *Keyes v. School District No. 1 Denver, Colorado*, 895 F.2d 659 (10th Cir. 1990), *petition for cert. filed*, No. 89-1698; *Brown v. Board of Educ. of Topeka*, 892 F.2d 851 (10th Cir. 1989), *petition for cert. filed*, No. 89-1681; *Pitts v. Freeman*, 887 F.2d 1438 (10th Cir. 1989), *petition for cert. filed*, No. 89-1290.

scope of judicial remedies is defined and limited by the scope of the constitutional violation.

Mandatory busing is harsh medicine even in its limited role as a remedy for egregious violations of constitutional rights. However critical the need to employ extraordinary remedies, just as vital is the necessity to restrict such measures to extraordinary circumstances. For coercive measures such as busing that displace community control over education can detract substantially from the educational mission, to the detriment of the very youngsters they are intended to benefit. Accordingly, such measures should seek to spend themselves as quickly as possible so as to return discretion to those entrusted with the high responsibility of educating our children.

As two scholars who have studied extensively the impact of sustained busing in a community have observed, "The politics of race can only end when . . . people no longer think of themselves in racial terms above all else, but identify themselves first as parents or teachers, . . . and only secondarily as black or white. . . ." R. Pride and J. Woodard, *The Burden of Busing* 283 (1985). The Court can hasten the arrival of that day by limiting the use of coercive race-based remedies to the most extraordinary circumstances, and by allowing communities that have accomplished the task of desegregation to turn their attention to the task of pursuing educational objectives in a race-neutral fashion.

ARGUMENT

I. THE REMEDIAL AUTHORITY OF THE COURTS MUST END WHEN A SCHOOL DISTRICT ASSURES THAT EDUCATIONAL OPPORTUNITIES ARE AVAILABLE TO ALL ON EQUAL TERMS.

At issue here is the question of when, if ever, judicial supervision of a "unitary" school system ceases. The Tenth Circuit, in its decision below reversing the contrary ruling of the district court, departed from well-established equitable principles when it ruled, in essence, that formerly segregated school districts must permanently retain coercive measures designed to maximize racial balance.

The constitutional right at stake in school desegregation cases is "the opportunity of an education . . . available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The vindication of this right throughout an entire school district represents the attainment of "unitary" status – what one court has aptly called "the 'accomplishment' of desegregation." *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987).

This Court has carefully delineated the authority of courts to engage in remedial action in the desegregation context. "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

The Court has established a number of specific limitations to ensure that desegregation decrees are tailored to the scope of the violation. First, judicial remedies are

permissible only upon a finding of causation; racial imbalance cannot justify a race-conscious remedy unless the "school authorities have in some manner caused unconstitutional segregation." *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1975). Second, coercive race-conscious remedies should play as limited a role as possible in the desegregation process. Thus, this Court has approved "the very limited use . . . of mathematical ratios" only as "a starting point in the process of shaping a remedy, rather than as an inflexible requirement." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). Third, the Court repeatedly has stressed that the remedial goal is desegregation, not racial balancing. "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24. Finally, once the indicia of past discrimination are removed from a dual school system, courts are "not entitled" to take further steps "to ensure that the racial mix desired by the court [is] maintained in perpetuity." *Spangler*, 427 U.S. at 436.

Once unitary status is attained, the predicate for further relief ends. Thereafter, remedial relief is permissible only if the school district "deliberaterly attempt[s] to fix or alter demographic patterns to affect the racial composition of the schools. . . ." *Swann*, 402 U.S. at 32; *accord*, *Spangler*, 427 U.S. at 435.

In conformity with these standards, the Fourth Circuit has held that once the underlying violation is cured, as reflected by the attainment of unitary status, the trial court is without authority to make further orders. *Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 535 (4th

Cir.), *cert denied*, 479 U.S. 938 (1986). More specifically, the First Circuit has ruled that unitariness triggers the "*mandatory* devolution of power to local authorities," *Morgan*, 831 F.2d at 318 (emphasis in original); and that once the school district has achieved desegregation goals in any facet of its school system, the Court may not "perpetuate an injunction requiring adherence to a particular formula" in that area. *Id.* at 326. The Fifth Circuit likewise has adopted this approach. *United States v. Overton*, 824 F.2d 1171 (5th Cir. 1987).

Were Oklahoma City in any other circuit, this case would not have appeared before this Court in its current posture. By any reasonable measure, the school district here has earned the right to pursue its educational mission free from judicial control, precisely the conclusion reached by the district court in this case.

The Oklahoma City school district was declared unitary in 1977, following an evidentiary hearing in which the district court found that the Finger Plan, a comprehensive remedial program that included massive cross-town busing, had eliminated all vestiges of state-imposed racial discrimination (App. 2a). The court entered an order declaring:

> Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimination so corrosive of the human spirit and so plainly forbidden by the Constitution.

Id. At that time, the district court relinquished jurisdiction over the case and returned the responsibility for race-neutral educational decisions to the Board of Education of the Oklahoma City Public Schools.

For eight years following the unitary declaration, the Oklahoma City School Board continued to implement the Finger Plan. In 1984, however, it became apparent that demographic changes had taken place within the school district and that the Finger Plan, if continued on the elementary level, would increase the burden of busing on young black children in grades K-5 and lead to the closure of a large number of schools in a predominantly black area of the city. In response, the school board adopted a Student Reassignment Plan, which was implemented for the 1985-86 school year. The plan eliminated compulsory busing in grades one through four and reassigned elementary students to their neighborhood schools, which resulted in the existence of a number of heavily black schools. The board retained a "majority to minority" transfer option which allowed students assigned to a school in which they were in the majority race to transfer to a school in which they would be in the minority. The new plan also appointed an "equity officer" who, assisted by an equity committee, would monitor all schools to insure the equality of facilities, equipment, supplies, books, and instructors (App. 5a).

Although the district court upheld this plan, finding that it was nondiscriminatory and served valid educational objectives (App. 17-19a), the Tenth Circuit reversed. Viewing the Finger Plan as a permanent

injunction, the court placed the burden on the school district to demonstrate changed circumstances to justify modification of the injunction (App. 14a). The court concluded that the district failed to carry its burden, in part because continued residential racial imbalance caused similar racial imbalance in the schools (App. 19a).

The Tenth Circuit's rule that coercive desegregation measures are in the nature of a permanent injunction and modifiable only by ~~a showing~~ of significantly changed circumstances amounts to a radical departure from desegregation jurisprudence. By sanctioning a remedy virtually without end, the Tenth Circuit's rule, by definition, far exceeds remedial authority as limited by the scope of the constitutional violation. As the Fifth Circuit has observed, the "difficulty with *Dowell's* approach is that it denies meaning to unitariness by failing even to end judicial superintendence of schools." *Overton*, 824 F.2d at 1175.

The Tenth Circuit's rule upsets as well the specific boundaries of permissible judicial action established by this Court. Its requirement of permanent adherence to racial ratios confuses the constitutional right to equal educational opportunities with the objective of racial balance, an approach this Court has warned "would be disapproved and [which] we would be obliged to reverse." *Swann*, 402 U.S. at 24. It seeks to hold the school district responsible for residential racial imbalance despite the absence of any showing that it is "in any manner caused by segregative actions chargeable" to the district. *Spangler*, 427 U.S. at 435. In sum, the Tenth Circuit's imposition of extraordinary remedial measures long after the wrong has been righted amounts to "a heady call for raw judicial power." *Overton*, 834 F.2d at 1176.

The Tenth Circuit attempts to rationalize its sweeping departure from well-established remedial principles by invoking the procedural cover of a permanent injunction. A court may not, however, evade limitations on its power by emphasizing form over substance. As the other circuits that have considered this issue have concluded, affirmative relief is no longer warranted – or authorized – when unitary status is achieved. *See e.g., Morgan, Riddick,* and *Overton, supra.* To state it in the vernacular of an injunction, the "changed circumstance" justifying the termination of injunctive relief is unitary status; and a significant change it is, for it means that the dual system of education no longer exits.

In a very real sense, school districts that have attained unitary status *do* operate under a permanent injunction: the constitutional command of nondiscrimination. Any individual is free to challenge school district policies as intentionally discriminatory. This prospect provides a sufficient safeguard to ensure that school district will not once again adopt discriminatory practices, and to ensure swift and meaningful relief if they do. In sum, the rule this Court should ratify is that *the only choice denied to a unitary school district is the choice to discriminate.*

The necessity of removing the scarlet "S" from school districts that have accomplished the difficult task of achieving a unitary educational system is supported as well by the societal interest in encouraging districts to undertake such efforts. As the Fifth Circuit has remarked, "The carrot of unitariness can be a meaningful incentive for school districts to desegregate only if we abide by our promise to release federal control once the job is done."

Overton, 834 F.2d at 1176. For Oklahoma City, which has successfully travelled the road to unitary status, the time has come for the court to return to the community the power to act in the best educational interests of its children.

II. EXPERIENCE DEMONSTRATES THAT LONG-TERM COERCIVE MEASURES DESIGNED TO MAINTAIN RACIAL BALANCE ARE INCONSISTENT WITH THE OBJECTIVE OF EQUAL EDUCATIONAL OPPORTUNITIES.

Equitable principles do not develop in a vacuum. They reflect centuries of acquired wisdom and experience with respect to the appropriate nature and extent of judicial interventions in personal disputes and societal ills. Departures from these principles thus can produce unexpected and tumultuous consequences. This risk is nowhere more pronounced than in the context of school desegregation, which affects directly the lives and opportunities of our nation's most precious resource: its children.

A growing consensus is developing among scholars, education officials, and parents that forced busing detracts from the educational mission. Though strongly committed to equal opportunities for all youngsters, many thoughtful individuals have concluded that such opportunities are not optimally served by measures that, in the words of columnist William Raspberry are "almost monomaniacally concerned with the maximum feasible mixing of races, with educational concerns a distant second." Raspberry, "The Easy Answer: Busing," *Washington Post*, Apr. 20, 1985, at A23. A number of factors associated

with busing contribute to these concerns, among them the phenomenon of "white flight," the cost and disruption of busing, and the availability of sound educational alternatives. We express no opinion on the salience of these factors in any given situation; we are attorneys, not social scientists. Our point is simply this: once a school district has purged itself of a segregated school system, it should once again have the discretion to act in the best educational interests of its children.

In this case, the Oklahoma City School District determined that the burden of busing borne by young black students was too great. It concluded that neighborhood schools – enhanced by an "effective schools" program and combined with the opportunity to transfer – would improve educational opportunities for these youngsters. The notion that this policy reflected a return to a dual system was rejected by the district court as "ludicrous and absurd" (App. 44b).

Under these circumstances, this conclusion is certainly unremarkable. What is remarkable, however, is the Tenth Circuit's insistence on adherence to racial balance as the permanent touchstone of a unitary school system's educational policies. As we show below, numerous legitimate justifications exist for school districts to pursue objectives other than racial balance. Indeed, a judicial rule that prohibits or discourages alternatives may harm most severely those who are the intended beneficiaries of desegregation.

A. White Flight. A major problem endemic to mandatory busing plans is white flight – the loss of middle-class white students who move away or enroll in private

schools. *See e.g., Riddick, supra* (approving school system's return to neighborhood schools due in part to white flight). The deleterious impacts of white flight are felt most strongly by the black youngsters left behind.

Most studies on white flight "concur that larger, central-city school districts with sizable minority enrollments experience significant long-term white flight following mandatory busing plans." D. Armor, "School Busing," in Katz and Taylor, eds., *Eliminating Racism* 266 (1988). White flight today appears to be caused more by educational concerns than by racism: in Los Angeles, where busing resulted in massive white flight, rates of white withdrawal were essentially unchanged regardless of whether the new assigned schools were predominantly white, black, or Hispanic. *Id.* at 269.

White flight is harmful primarily in two ways. First, it frustrates the objectives of desegregation. Although "mandatory [busing] plans do the best job of producing racial balance," observes social scientist David J. Armor, they do so "usually only at the cost of converting all schools to predominantly minority status." *Id.* at 270-271. Thus, "mandatory busing has aggravated the growing racial isolation" of many cities. *Id.* at 271.

A second consequence of white flight is the loss of vital community support for public schools. In their study of the impact of long-term busing in Nashville, Richard A. Pride and J. David Woodard found that white flight

> was a significant and continuing problem. . . . Traditionally, the white middle class had been the public schools' strongest ally; its members had supported the schools politically, financially, and, through countless hours of volunteer labor, personally. Without their strong support, the public schools could slip into mediocrity or worse.

Pride and Woodard at 141. An overwhelming majority of whites and a large plurality of blacks in Nashville expressed the view[2] that community support would return following a restoration of neighborhood schools. *Id.* at 153.

Given the reality of white flight, a school board could reasonably conclude that mandatory busing thwarts effective desegregation and reduces prospects for quality schooling, particularly for poor youngsters. Unitary school districts therefore should have discretion to deal with such problems.

B. Black Flight and the Burden of Busing on Blacks. Justice Powell observed that "[a]ny child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school, suffers an impairment of his liberty and privacy." *Keyes*, 413 U.S. at 247-248 (Powell, J., concurring in part and dissenting in part). Black children, in particular, "for years have borne the heaviest personal cost of desegregation by enduring long bus rides, separation from familiar surroundings, and curtailment of extracurricular activities." National Institute of Education, *School*

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[2] Surveys were taken on various educational issues in Nashville between 1977-1981 after several years of court-imposed busing.

Desegregation and Black Achievement 43 (1984) [henceforth "NIE Study"].

Moreover, "abandonment of neighborhood schools tends to limit parental participation in, and supervision of, the operation of the school system and lessens the importance of the school as a center of community concern and cohesion." *Keyes*, 413 U.S. at 246 (Powell, J.). This diminished parental involvement is potentially devastating to black educational achievement, since studies show a strong correlation between parental involvement and higher student grades and test scores, positive student attitudes and behaviors, and improved school atmospheres. Jennings, "Studies Link Parental Involvement, Higher Student Achievement," *Education Week*, April 4, 1990, at 20.

Little wonder then that black parents are growing increasingly skeptical about busing. As Pride and Woodard found in Nashville, "adults of *both* races believe that busing is unfair," but such feelings "may be especially acute among blacks, the very group the policy was designed to help." *Id.* at 284. Surveys in Nashville revealed that 58% of black parents believed busing was harmful to the educational development of white and/or black school children, *id.* at 151; and that 38% of black parents would enroll their children in private schools if they could afford to do so. *Id.* at 153. A study in Boston found that 75% of black parents involved in busing would prefer their children attend neighborhood schools of equal quality. Cuddy, "A Proposal to Achieve Desegregation Through Free Choice," *American Education*, May 1983, at 28-29.

Understandably, a sizable "black flight" away from inner-city public schools has taken place in many cities. Fully half the students in urban private schools (including Catholic schools) are black, and another third are Hispanic. Moreover, half of urban private schools families are low-income. See C. Bolick, *Changing Course: Civil Rights at the Crossroads* 108 (1988). In many private schools, "low socioeconomic status minority youth are scoring above the national average on standardized tests." Cuddy at 26. Busing appears both a cause of the desire of many black families to seek alternatives, as well as an impediment to school districts in responding to those desires.

The disproportionate burden of busing shouldered by black youngsters thus provides a legitimate basis for educational decisionmakers to reject racial balance policies in favor of those that expand choices or improve educational quality.

C. Effects on Education Achievement: Although busing is costly in many ways,[3] it provides few, if any, offsetting educational benefits, particularly for its intended beneficiaries. Despite nearly three decades of forced busing, "there remains a persistent and large gap" between black and white students in achievement test scores, high school dropout rates, and college attendance

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[3] As Justice Powell remarked, "At a time when public education is suffering serious financial malnutrition, the economic burdens of [busing] may be severe, requiring both initial capital outlays and annual operating costs in the millions of dollars." *Keyes*, 413 U.S. at 248 (Powell, J.). See also L. Graglia, *Disaster by Decree* 264 (1976).

and completion rates. Committee on the Status of Black Americans, *A Common Destiny* 378 (1989). The "assumption that integration would improve achievement of lower class black children has now been shown to be fiction," according to James Coleman, whose 1966 study was cited by many advocates of busing. See Cuddy at 26.

The NIE Study on desegregation and black achievement,[4] which produced "the most comprehensive and in-depth treatment of the issue ever," reached "a definitive conclusion: desegregation has small positive effects on black student achievement in reading and no effects on black achievement in math." *See* Ascik at 19. Even more to the point, academic gains took place in school districts with *voluntary* desegregation programs, while those with *mandatory* plans reported either no gains or actual losses in black student achievement. NIE study at 26. Other studies have found that black students' educational and occupational aspirations remained equal or fell below those of whites following desegregation, and that blacks in non-integrated schools have higher self-esteem than blacks in integrated schools. *See* Committee on the Status of Black Americans at 373-374.

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[4] The NIE study was conceived as "a way to reconcile the disagreements" among social scientists on this issue. The study was conducted by seven distinguished social scientists who previously had reached divergent findings. The study produced "remarkable convergence about the fundamental question." *See* Ascik, "An Investigation of School Desegregation and Its Effects on Black Student Achievement," *American Education*, December 1984, at 17.

As David Armor has concluded, these findings raise

> serious questions about compulsory desegregation methods such as mandatory busing. There is little justification for forcing . . . children into expensive, time-consuming cross-town bus rides when there is no educational advantage. . . . It should be made clear to all . . . that simply changing to schools that are more racially balanced than one's neighborhood school is no guarantee of a superior education. Indeed, they may be giving up possible advantages of special programs in their own school – programs designed specifically to enhance education and proven to work.

NIE Study at 60-61. The overwhelming weight of the data thus suggests that policies designed primarily to promote racial balance do nothing to promote – and may in fact inhibit – efforts to improve educational quality.

D. Availability of Sound Educational Alternatives. The failure of forced busing has prompted many advocates of expanded educational opportunities for blacks to call for a different approach. Derrick Bell, among others, has called for "educationally oriented relief" for past racial discrimination that embraces policies that provide "real opportunities for blacks without the cost and disruption of busing." Bell, "Civil Rights Commitment and the Challenge of Changing Conditions in Urban School Cases," in A. Yarmolinsky, L. Liebman, and C. Schelling, eds., *Race and Schooling in the City* 201 (1981).

Essential elements of successful programs for disadvantaged minority students include school leadership, parental participation, and teacher accountability. *Id.* Policies geared to improved quality of instruction, classroom

morale, and stimulation in the home environment, concludes Herbert J. Walberg, are far preferable to racial balancing, which "does not appear promising in the size or consistency of its effects on learning of Black students." NIE Study at 187.

What now appears clear is that neighborhood schools can provide high-quality educational opportunities even if they are not racially balanced. *See, e.g.*, Bell at 201. Moreover, a number of wide-ranging reforms offer significant potential for improving educational quality and expanding opportunities, such as magnet schools,[5] "controlled choice,"[6] district-wide open enrollment with transportation,[7] metropolitan area-wide or statewide open enrollment, and vouchers.[8] The State of Wisconsin recently adopted a voucher program for Milwaukee's most economically disadvantaged students, providing free choice among nonsectarian private schools.[9] Alternatives like these demonstrate that school officials acting in good faith have a wide variety of options at their disposal

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[5] *See, e.g.* Bennett, "A Plan for Increasing Educational Opportunities and Improving Racial Balance in Milwaukee," in Willie and Greenblatt, *School Desegregation Plans That Work* 81 (1984).

[6] *See, e.g.* Alves and Willie, "Controlled Choice Assignment: A New and More Effective Approach to School Desegregation," 19 *Urban Review* 67 (1987).

[7] *See, e.g.* Cuddy, *supra*.

[8] Armor, "After Busing: Education and Choice," *Current*, October 1989, at 18-20.

[9] *Wisc. Stat.* § 119,23 (1990); *see also* William Snider, "Voucher System For 1,000 Pupils Adopted in Wisconsin," *Education Week*, March 28, 1990.

to make "the opportunity of an education . . . available to all on equal terms." *Brown*, 347 U.S. at 493.

E. A Unitary School District Reasonably May Consider These Factors in Determining Educational Policies. The sum of the evidence strongly suggests that "plans that mandatorily assign students to schools outside of their immediate neighborhoods tend to destabilize over time and have no inherent educational value." Alves and Willie at 70. Policymakers legitimately may respond to this evidence in any number of ways; what is essential is that they have the discretion to do so. If unitary status means anything, these real-world considerations compel it to mean that school districts once again may turn their primary focus toward educational objectives rather than racial balance.

These are precisely the type of factors the Oklahoma City school board took into account when it adopted its revised plan. The district considered the desirability of parental and community involvement that a partial return to neighborhood schools would produce (App. 26b-28b). It considered the burden that would be borne primarily by black students in continuing a forced busing plan at the first-through-fourth grade levels (App. 7a). In returning to neighborhood schools at these grade levels, the district provided to parents the option to exercise "majority to minority" transfers (App. 4a-5a). The district also has operated an "effective schools" program that has "resulted in overall academic gains at 8 of the 10 predominantly black elementary schools exceeding the average gains made by black children nationally," placing the school district "well on its way to becoming a nationally recognized model urban school district" (App. 43a). All

of these factors convinced the district court that no further coercive measures were necessary.

Given its sustained and successful efforts in eradicating its prior dual educational system, an order prohibiting Oklahoma City from acting in ways that are demonstrably in the best educational interests of its schoolchildren turns the notion of equity on its head. Bigots no longer control the Oklahoma City schools; people who have demonstrated their commitment to equal educational opportunities do. The time has arrived for courts to recognize that in some places, like Oklahoma City, times have changed.

The critical flaw of the Tenth Circuit's decision in this case is that it lost sight of the fact that schoolchildren are the intended beneficiaries of school desegregation, and that their protected right is equal educational *opportunity*. That right is subverted by a judicial rule that makes racial balance rather than educational opportunities the permanent primary governing principle in a school system.

CONCLUSION

For the foregoing reasons, we urge this Court to reverse the decision of the Tenth Circuit.[10]

Respectfully submitted,

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[10] We also ask the Court to grant *certiorari*, and to reverse and remand in light of its decision in the instant case, the decisions of the Tenth Circuit cited in footnote 1, *supra*, presenting unitary status issues in the Denver and Topeka desegregation cases.

No. 89-1080

Supreme Court, U.S.
F I L E D
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICI CURIAE OF THE COUNCIL OF THE GREAT CITY SCHOOLS, THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

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BRIEF AMICI CURIAE OF THE COUNCIL OF THE GREAT CITY SCHOOLS, THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

INTEREST OF AMICI CURIAE

The Council of the Great City Schools ("the Council") is a coalition of 45 of the largest urban public school districts in the United States.[1] Council members educate

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[1] The members of the Council are: Anchorage, Atlanta, Baltimore, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Columbus, Dade County, Dallas, Dayton, Denver, Detroit, East Baton Rouge, El Paso, Fresno, Houston, Indianapolis, Jacksonville, Long Beach, Los Angeles, Memphis, Milwaukee, Minneapolis, Nashville, New

12 percent of the nation's schoolchildren and one-third of the nation's minority children. The Board of Directors, the Executive Committee and other committees of the Council are comprised of superintendents and school board representatives from member districts. The Council was organized in 1961 to help large urban school districts develop and implement programs designed to ensure quality education and equality of educational opportunities for urban students. The Council represents major school districts before the federal legislative and executive branch officials who determine national educational law and policy.

The American Association of School Administrators ("AASA") is the national professional organization for school district administrators and other educators in our nation's public schools. AASA's members include approximately 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies. Thus AASA's members are responsible for the daily operation of our nation's diverse public school systems, many of which have implemented desegregation plans.

The National Association of Secondary School Principals ("NASSP") is a voluntary association of approximately 42,000 administrators of public and private secondary schools throughout the United States. It was organized in 1916 to provide a voice for secondary school principals and assistant principals in the formulation of all aspects of educational policy in the United States. Many NASSP members are thus deeply involved in the day-to-day implementation of desegregation remedies throughout the nation.

Orleans, New York City, Norfolk, Oakland, Omaha, Philadelphia, Phoenix, Pittsburgh, Portland, Rochester, St. Louis, St. Paul, San Diego, San Francisco, Seattle, Toledo, Tucson, Tulsa and Washington, D.C.

The Council, AASA and NASSP file a brief in this case for three reasons. First, these *amici* have considerable experience bearing upon the issues presented by the case. For example, 13 of the Council's 45 member districts are currently under active federal court supervision and eight of these districts have been under federal court order for more than ten years. Seven member districts have been declared unitary, but the status of 17 districts is unclear because although they have been under federal or state desegregation orders in the past, the active supervision of these orders has ceased, without a declaration of unitariness. Another eight Council member districts, while not under court order, have undertaken desegregation efforts to comply with what they see as their obligation to provide equal educational opportunity and their desire to be in all respects a unitary school system.

Second, the Court's resolution of the central issue in this case—the nature and duration of federal-court supervision of desegregation programs—will have a dramatic impact on these *amici* and their members. It was 36 years ago, in *Brown v. Board of Education*, 347 U.S. 483 (1954), that a unanimous Supreme Court committed this nation to eliminating the scourge of official segregation in our public schools. We have made an enormous amount of progress toward that goal, but the job is not yet done. The school districts and the administrators who are members of *amici* are fully committed to completing the task and to ensuring that the constitutional rights of minority children are fully protected.[2] As the same time, they are also fully committed to acting in their respective capacities in such a manner as to restore local autonomy to their school districts and end the need for further federal court involvement. Their

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[2] The minority student populations in Council member districts range from 21.7 percent to 96.5 percent, and AASA and NASSP members similarly serve in dozens of diverse school districts.

efforts to achieve these two goals have been hampered because the lower federal courts have developed a variety of uncertain, sometimes conflicting standards to determine when a school system is desegrated and when judicial oversight should terminate. As we enter the last decade of the Twentieth Century, *amici* believe it is important for this Court to clarify these issues so that the nation's effort to eliminate the vestiges of its history of segregation can be completed and its schools returned to appropriately elected and appointed school officials who have demonstrated the commitment necessary to ensure the rights of minority children.

Finally, these *amici* have a view of these issues that they believe is different from that of either party. Specifically, the Council, AASA and NASSP contend that the central question presented—whether the dissolution of desegregation decrees must meet the standard enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932)—turns on two important considerations. First, where violations of the rights of minority students have been found, those violations must be fully remedied and the interests of those students judicially protected during that remedial process. Second, there must come a time in each school desegregation case when court supervision ends and the operation of local schools is returned fully to local school district officials. As explained in this brief, *amici* believe that the best way to achieve both of these important goals—complete vindication of minority children's constitutional rights and restoration of local autonomy—is for this Court to (1) determine in this case the standards that must be met to prove that a unitary school district has been established; and (2) hold that once such a district has been established, outstanding federal-court injunctive decrees must be dissolved.

SUMMARY OF ARGUMENT

The question whether all federal-court injunctive decrees must be dissolved upon the finding of unitariness cannot be fully and fairly considered apart from the *standard* by which unitariness was found. The purpose of injunctive decrees in all desegregation cases should be to ensure that the harm of segregation has been *fully* remedied. In our view, the standard for unitariness should in substance mirror that purpose. Where such a standard is applied and met, it follows that any outstanding injunctive decrees should be dissolved. But until the *content* of that standard has been established, the Court cannot know whether the standard ensures that the purpose of the injunctive decrees has been met and the decree therefore may be appropriately dissolved. For that reason, and because the lower courts have in practice been applying *conflicting* unitariness standards, this Court should address and determine the correct standard in this case.

A declaration of unitariness should be issued only after the district court has made findings on three issues: (1) whether the defendants have substantially complied with all outstanding desegregation orders; (2) whether the desegregation plans and orders have been effective in remedying the violations found by the court, *i.e.*, whether they have eliminated segregation and its vestiges to the maximum extent practical; and (3) whether the defendants have demonstrated sufficient good faith in the desegregation effort that the court expects the school district to afford full protection to the constitutional rights of minority school children. The parties should be offered the opportunity for a full evidentiary hearing on each of these issues and, where a defendant school district meets these three requirements, unitariness should be declared and judicial supervision should end.

ARGUMENT

I. The Standard For Dissolving An Injunction Against A School District Declared Unitary Cannot Be Fairly Resolved Without Addressing The Standard By Which A District May Appropriately Be Declared Unitary.

A. The Meaning of Unitariness Is Logically Encompassed in the Question on which this Court Has Granted Review.

The Petitioner itself recognized in seeking review by this Court that "[t]he question of when a desegregation decree should be lifted is an important unsettled question, intertwined with the meaning of unitariness itself. . . ."[4] This intertwining results from the fact, long made clear by this Court, that "unitariness" is the goal of all judicial supervision of school district defendants that have been found liable for unconstitutional segregation. Thus, as the Court recognized in *Green v. County School Board*, 391 U.S. 430, 436 (1968), "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about" in the desegregation cases. *Accord, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971).

Mandatory injunctions have been the near-universal means by which the federal courts have attempted to bring about unitary status. If the purpose of a desegregation injunction is to bring about unitary status, consideration of whether an injunction survives a declarration of unitariness, under the *Swift*[4] standard or any other approach, is incomplete without a common under-

[3] Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit of the Board of Education of Oklahoma City Public Schools, at 24 (filed Jan. 3, 1990) (hereinafter "Petition").

[4] *United States v. Swift*, 286 U.S. 106 (1932).

standing of what unitary status means.[5] An injunction is only the means to the goal of desegregation. To *amici*, it is not logical to separate the issue of when an injunction should be lifted from the issue of whether that injunction has achieved its goal and cured the condition that was found to violate the Constitution. Put another way, it puts the cart before the horse to consider how long an injunction endures without weighing whether it has done the job of creating a desegregated school system.

In our view, it makes no sense to talk of a school district being "unitary" unless the constitutional violation has been cured, just as in *Swift*, the Court expressed reluctance to release defendants from an injunction until their unlawful monopoly was cured. There would be no need, however, to apply the precise verbal formulation of the *Swift* rule in school desegregation cases if a tough but workable requirement for unitariness determinations were uniformly applied, because the purpose of the *Swift* rule—to ensure that a remedy has fully cured the violation found by the court—would be fully satisfied. The *Swift* issue and the unitariness issue are therefore fundamentally the same: has the condition necessitating judicial intervention been fully cured? If it has, judicial supervision should end; but unless the *content* of the

[5] This Court has held that questions not directly presented in a petition for certiorari but "fairly comprised" in it should be decided where their resolution is essential to the correct disposition of other issues in the case. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 552 n.5 (1980). Accordingly, where a given issue is "predicate to an intelligent resolution" of a question on which certiorari was granted, this Court has felt compelled to address it. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). *See also Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 66, 68-69 (1938) (Court reached issue of whether *Swift v. Tyson*, 41 U.S. 1 (1842) was still good law although parties agreed on that issue).

unitariness standard ensures that the constitutional violation has in fact been fully remedied, there can be no assurance that the judicial task is complete. For this reason alone, the Court should address the appropriate content of the unitariness standard in this case.

B. If the Court Declines to Address the Unitary Standard in This Case, Detrimental, Conflicting Results in the Lower Courts Will Inevitably Continue.

If the standards and procedures for unitariness were clear and uniform, the Court could restrict itself to the narrow issue whether a desegregation decree survives a declaration of unitariness. Unfortunately, the lower federal courts have articulated a variety of standards of unitariness. Indeed, members of the Council, AASA and NASSP now function under widely different substantive standards for achieving unitariness depending on the federal judicial circuit in which they are located. Furthermore, member districts may or may not have an opportunity for an evidentiary hearing, depending on the court that considers the issue.

The courts below have used the word "unitary" in a variety of inconsistent ways. For example, the Eleventh Circuit, relying on Fifth Circuit precedent, draws a distinction between a "unitary school district" and a district that has achieved "unitary status." In *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985), the court explained that a district that meets the requirements of *Green* and *Swann* and has not operated segregated schools "for a period of several years" is unitary, but that a school district cannot be said to have achieved "unitary status" unless it "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures." 775 F.2d at 1413 n.12. The court held that a district that is "unitary" but has not achieved "unitary status" retains its affirmative obligation to eliminate the vestiges of prior unconstitutional conduct and

that a challenge to school district action may be successful without proof of segregative intent. *Id.* at 1414.

It is also unclear what standard of actual desegregation must be reached for a district to be considered unitary. Some courts have relied heavily on mathematical evidence of racial balance where further desegregation may be possible, *Vaughns v. Board of Education of Prince George's County*, 758 F.2d 983 (4th Cir. 1985), while others have recognized circumstances in which it is appropriate to allow one-race schools to remain. *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987). Some courts have even suggested that the mere passage of time can lead to unitary status. *See, e.g., Bradley v. Baliles*, 639 F. Supp. 680, 691 (E.D. Va. 1986) (court noting, "the longer the time since a school system has been segregated, the less likely it would be that the vestiges of such segregation remain in the system"), *aff'd*, 829 F.2d 1308 (4th Cir. 1987).

Furthermore, most of the circuits have not addressed the question of the specific procedures to be conducted by a district court in deciding whether a school district is unitary. The Fifth Circuit, however, has fairly detailed procedural requirements, including an opportunity for a hearing, for evaluating the achievement of unitary status. *See Youngblood v. Board of Public Instruction of Bay County*, 448 F.2d 770 (5th Cir. 1971).[6] The Eleventh Circuit generally has followed the approach of the Fifth Circuit. Thus, in *Pitts v. Freeman*, 755 F.2d 1423 (11th Cir. 1985), the court reversed a district court's finding of unitariness because it failed to hold a hearing prior to its determination. *Id.* at 1426 ("[i]n

[6] *See Monteilh v. St. Landry Parish School Board*, 848 F.2d 625, 629 (5th Cir. 1988) ("because our procedures had not been followed before the court in 1971 declared St. Landry to be unitary, we find neither the district court nor the panel affirming its order intended to declare that the district was unitary, in the sense of having eliminated all vestiges of past discrimination").

order to conclude a school desegregation case, a district court must hold a hearing to determine if the school system indeed has achieved unitary status").

Of greatest importance here, courts have made statements about "unitary status" on the assumption that their orders nonetheless would continue in force. It is not clear that those statements would have been made if the law were clear that desegregation decrees do not survive a finding of unitariness. For example, Petitioner relies on a 1977 reference by the District Court calling the Oklahoma City Public Schools "unitary." Petition at 3. But the order also makes clear that the court assumed the termination of its jurisdiction would not result in any "dismantlement of the Plan . . . ."[7]

This disarray among the lower federal courts has a dramatic adverse impact on school districts operating under court-ordered desegregation plans, including Council member districts and those in which AASA and NASSP members work. A major problem for such school districts is extended litigation over whether they are unitary and what continuing obligations, if any, unitariness entails. Some school districts have sought to establish that they are unitary, only to find upon reaching court that they have prepared to litigate under one standard, while the court imposed another. Other districts remain for extended periods under court jurisdiction without raising the unitariness issue for fear that they will incur new court-ordered obligations through the process. Still others have not had any active involvement by the district court for years, but feel completely unclear about their ability to take steps that would be inconsistent with old court orders.

This Court would only exacerbate the confusion and create unintended results by ruling on the *effects* of uni-

[7] Brief in Opposition to Petition for Certiorari of Robert L. Dowell, *et al.*, at 2a (filed March 5, 1990).

tary status without providing guidance as to how a proper determination of unitariness may be made in the first instance. To conclude, for example, that no further court supervision or injunctive relief may continue in a school district that has been labeled "unitary," without ensuring that a tough, workable standard for unitariness has been applied, could leave minority schoolchildren without ever having a full remedy for the constitutional wrong they have suffered. On the other hand, to hold that the strong language of *Swift* governs even after the vestiges of segregation have been eliminated might result in failures to return schools to local control in a timely manner. In addition, for this Court to hold that all judicial supervision of a school district must end upon the finding of unitariness—irrespective of the standard for that finding—will inevitably produce conflicting judicial supervision owing to varying standards of unitariness. The tough but workable requirements for achieving unitariness that we propose would minimize these unwanted results. We urge the Court to adopt them in this case.

II. Desegregation Injunctions Should Be Dissolved And Full Operating Control Returned To A Defendant School District Only When It Has Substantially Complied With All Outstanding Court Orders, Eliminated The Vestiges Of Segregation To The Maximum Extent Practical And Demonstrated A Good-Faith Commitment To Protecting The Constitutional Rights Of All Students.

The Council, AASA and NASSP urge the Court to make clear that unitariness requires an opportunity for a full evidentiary hearing to determine whether: (1) the defendants have substantially complied with all outstanding court orders; (2) the identified vestiges of segregation have been eliminated to the maximum extent practical; and (3) the defendants have demonstrated suffi-

cient good faith to indicate that further court oversight is not needed to assure vindication of constitutional rights. After a school district has satisfied this standard, court jurisdiction should end, injunctive orders should cease, and full operating autonomy should be restored to the school system.

We recommend this standard because we believe that there must come a point when each school desegregation case ends. We believe that this is the fair implication of the *Brown II* decision, in which district courts were authorized to retain jurisdiction only during a "[period of] transition to . . . a racially nondiscriminatory school system." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). This also was the meaning of the Court's extended discussion in *Swann* of the limits on federal equitable power:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that the federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

402 U.S. at 31-32. *Accord, Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435-37 (1976).

Full control ultimately should be returned to local school authorities because, as the Court also has recognized, "local autonomy of school districts is a vital national tradition." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977). *Accord, Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("[n]o single tradition in public education is more deeply rooted than local control over the operation of schools"). *Amici* recognize, however, that school districts found to have violated the Constitution must meet meaningful standards to earn the trust that they can once again operate the schools consistent with the Constitution and free from continuing court orders.

The first prong of the three-part test that we recommend is whether the defendant school district has substantially complied with all outstanding court orders. This standard is intended to ensure that the remedial plans developed by the parties and the court have been implemented. It also provides school districts with clear guidance on what their first priority should be in seeking to attain unitary status.

But compliance alone should not become the basis for a determination of unitary status. This Court has held repeatedly that *effectiveness* in eliminating vestiges of discrimination is the standard to be employed in judging school desegregation remedies.[8] This constitutes the second prong. The Court held early on in *Raney v. Board of Education*, 391 U.S. 443 (1968), that a release of jurisdiction upon a showing merely that a school district adopted a remedial plan would "ordinarily be inconsistent with the responsibility imposed on the district courts by *Brown II*." 391 U.S. at 449 (citation omitted). It still is true today that effectiveness in implementation must be considered as well, because a plan initially approved and faithfully followed may turn out to need ad-

[8] *See Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

justment or enhancement before it is successful in removing the lingering vestiges of segregation. It is not realistic to expect the parties in desegregation cases or the district courts to arrive in the first instance at a totally sufficient plan.

As this Court directed in *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971), school districts under court order are bound to achieve "the greatest possible degree of *actual desegregation*, taking into account the practicalities of the situation." 402 U.S. at 37 (emphasis added). Similarly, *Swift* and its progeny teach that a decree may be modified if necessary to achieve its original purpose. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). Accordingly, vestiges that have been found causally related to unconstitutional segregation should be required to be removed. These vestiges can include segregative student or faculty assignments, disproportionate racial representation in extracurricular activities, or other discriminatory placement and teaching practices; segregated housing patterns; unequal facilities; or inadequate educational programs. *See Milliken v. Bradley*, 433 U.S. 267 (1977); *Swann*, 402 U.S. at 18; *Green*, 391 U.S. 430.

The parties also should have the opportunity to address the good faith of the defendants. Therefore, the third prong is the district court's test of the defendants' good faith; a district court should find a school district unitary only if it is confident that the school district defendant is aware of its constitutional obligations and will continue to fulfill them.[9] Where a court has reason to believe that racial animus taints local decision-making, it may be appropriate to retain jurisdiction temporarily after the other two standards have been met. This third prong is an unexceptional application of traditional equitable principles.

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[9] *See Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987).

The standards that we propose lend clarity and give direction, but are intentionally quite general. This recognizes the different circumstances existing in school districts throughout the country and permits the district courts to fashion their orders to reflect the unique conditions of each school district.

Finally, the parties should have the opportunity to probe all three of these issues at a full and fair evidentiary hearing. If a hearing is requested, the school district should have an opportunity to present its evidence, and the plaintiffs and other parties should have an opportunity to present evidence in support or opposition.

A holding by the Court now that there will be an opportunity for a hearing serves several positive purposes. First, it avoids the risk to all parties in these cases that a trial court will make pronouncements about unitary status issues without hearing from all concerned parties and weighing all of the relevant evidence. Second, it encourages full and faithful constitutional compliance by school districts because they will be on notice that their conduct may be aired in a public forum. Finally, it protects the due process interests of the plaintiffs, who are entitled to a hearing if they so request before their rights in the injunction are terminated.

CONCLUSION

Thirty-six years after *Brown* we remain firmly committed to its principles and believe this Court should not back away from them. There may be no single issue that has been as dominant a concern for AASA, NASSP and the Council in recent years as how to provide equal educational opportunity for minority students. *Amici* recognize that this challenge requires that we not limit our concerns for students to those matters comfortably falling within the confines of our classrooms. We know as educators that where our schools are built on the legacy of segregation, remedial measures must be directed specificaliy at the imbalanced racial compositions of schools,

faculty and staff, the reduced expectations that adults often bring to their contacts with minority children, and the resource deprivations that were the product of schools —or even school districts—being viewed as fit only for minority children. This Court has so taught for decades in its cases from *Brown v. Board of Education*, 347 U.S. 483 (1954), through *Milliken v. Bradley*, 433 U.S. 267 (1977). The approach outlined in this brief will best help us to fulfill the promise of *Brown* and to regain full control of our schools when the vestiges of segregation have been eliminated.

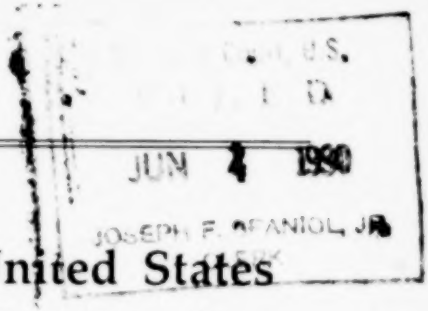
For the foregoing reasons, this Court should hold that mandatory injunctive relief in school desegregation cases ends where it has been established, after an opportunity for an evidentiary hearing, that the school district defendant has substantially complied with all outstanding court orders, eliminated the vestiges of segregation to the maximum extent practical, and exhibited a good-faith commitment to protecting the constitutional rights of its students.

Respectfully submitted,

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No. 89-1080



In The

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*,

Respondents.

On Appeal From The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS

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BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* on behalf of its members.[1]

[1] MSLF has obtained the written consent of all parties to this action. The letters communicating such written consent have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF has an extensive background and expertise in civil rights litigation.[2]

MSLF and its members oppose the involvement of the federal judiciary in the control and management of the nation's public schools except when absolutely necessary to ensure compliance with the Constitutional mandates of equal protection. However, such involvement, by its very nature, and consistent with well-established principles of common law, must be temporary and endure only so long as necessary to achieve that which is required by our Constitution – equal protection under the law. MSLF and its members believe once that goal has

[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In addition, MSLF has participated as counsel or *amicus* in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, 476 U.S. 1137 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987); *City of Richmond v. J.A. Croson Company*, 109 S.Ct. 706, 735 (1989).

been achieved, management and control of the public schools must be returned to the people.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus curiae adopts the statement of the case and the statement of the facts as set out in Petitioner's Brief.

SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals, alone among the Circuits, has refused to follow well-established precedent in giving effect to an express determination that a school district has become "unitary." In addition, the Tenth Circuit has failed to guide – and has thus compounded the errors of – one of its lower courts in ascertaining the constituent parts and nature of unitariness, the effects of remedial decrees, and, finally, the limitations of judicial oversight.[3]

In the instant case, the issue is the nature of a school district's continuing obligations once the original remedial order has been executed and the district has been deemed "unitary." In the Denver case the issue is twofold: first, the nature of a school district's continuing

[3] *Wilfred Keyes, et al. and Congress of Hispanic Educators, et al. v. School District No. 1, Denver, Colorado, et al.*, Nos. 85-2814 and 87-2634 on appeal from United States Court of Appeals for the Tenth Circuit, (January 30, 1990), hereinafter "the Denver case."

obligations once the original remedial order regarding student assignments has been dissolved, and second, the ability of the District Court to withhold a finding of "unitary" and instead impose a new "interim" decree which maintains, in perpetuity, judicial control.

Together these two cases reveal a misunderstanding of the law of desegregation, that is, the need for adherence to centuries old principles of common law. More simply: a wrong and its remedy ascertained and fashioned in a court of law. The law of desegregation is not *sui generis*, but must lie within well-established principles of common law.

Together these two cases define one of the most important issues facing this Honorable Court: How does a public school district achieve "unitary" status and end judicial control of the education of its young?

This Honorable Court has before it, in the instant case, and with the pendency of the Denver and Topeka cases from the same circuit, a unique opportunity to articulate a precise definition of "unitary" and to synthesize the generalities in the decisions of this Honorable Court with the refinements accomplished by enlightened Circuit courts using well-established principles of common law.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE – THAT A SCHOOL DISTRICT ONCE DETERMINED TO BE "UNITARY" CONTINUES UNDER THE CONTROL OF THE FEDERAL JUDICIARY – IS INCONSISTENT WITH THE HOLDINGS OF THIS HONORABLE COURT, IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, IS CLEARLY ERRONEOUS AND MUST BE REVERSED.

The decision of the Tenth Circuit Court of Appeals in the instant case – that the Oklahoma City Public Schools, having been found to be "unitary," nevertheless must continue within the control of the federal judiciary – is inconsistent with the holdings of this Honorable Court, is in conflict with the decisions of other Circuits, is clearly erroneous, and must be reversed.

In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 6 (1971), this Honorable Court granted *certiorari* to assist schools and courts struggling under a mandate to dismantle dual school systems, by "defining in more precise terms . . . the scope of the duty of school authorities and district courts in implementing *Brown I*." As a result of that decision, numerous school districts accomplished their affirmative duty to desegregate and achieve unitary status.

In *Riddick v. School Board of City of Norfolk*, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 420 (1986), the Fourth Circuit Court of Appeals refused to reimpose court authority over the school district, since the district had been found to be unitary, and since the subsequent changes in the school system had been prompted by

demographic changes. The Fourth Circuit declared that "once the goal of a unitary system is achieved, the district court's role ends," and concluded that the previous finding that the school district was "unitary" "returned control of the city's schools to the school board." *Id.*, at 535, 538.

The Fourth Circuit's decision was founded upon the *de facto/de jure* distinction recognized by the Supreme Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973). The Fourth Circuit held that judicial control of a school district cannot "continue in perpetuity to prevent resegregation absent a showing of intent to discriminate." *Riddick*, 784 F.2d at 534.

In the instant case, the Tenth Circuit was cognizant of the *Riddick* decision, but chose not to distinguish it. The Tenth Circuit concluded that *Riddick* "seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect." *Dowell v. Board of Education of Oklahoma City Public Schools*, 795 F.2d 1516, 1520 n.3 (10th Cir. 1986). Concluded the Tenth Circuit, "[t]he Fourth Circuit has taken a different view with which we cannot agree." *Id.*

The Fifth Circuit Court of Appeals examined this conflict between the Fourth and the Tenth Circuits and concluded:

> The difficulty with *Dowell's* approach is that it denies meaning to unitariness by failing ever to end judicial superintendence of the schools.
>
> * * *
>
> We see *Dowell's* effort to declare a school system to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness.
>
> * * *
>
> In sum, the idea that a school district can be declared unitary and yet be answerable to the federal courts for failure to abide by desegregation plans, regardless of segregative purpose, is at war with itself.

United States v. Overton, 834 F.2d 1171, 1175, 1176, 1177 (5th Cir. 1987). Other circuits have ruled similarly:

> Although the [Supreme] Court has produced no formula for recognizing a unitary school system, the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities.

Morgan v. Nucci, 831 F.2d 313, 318 (1st Cir. 1987).

> Retention of jurisdiction where there is no longer a demonstrated need to monitor compliance may defeat important governmental and personal interests . . . . There is no warrant for retaining further jurisdiction in the case, and the district court should enter an order relinquishing all further jurisdiction.

Spangler v. Pasadena Board of Education, 611 F.2d 1239, 1241 (9th Cir. 1979) (Kennedy, J., concurring).

In *Overton*, the Fifth Circuit held:

> [C]ontinuing limits imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable. Stated another way, the constitutional violation is purposeful separation of

> races in public education. The mix that would have occurred but for the racism is a judicially created hypothetical. We have insisted upon matching that model of a unitary desegregated status as a remedy for the wrong. Refusing, after the match, to allow a school district to vary from that model unless it proves its "non-segregative" purpose confuses wrong and remedy.

834 F.2d at 1176-77. Further, "attaining unitary status . . . means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate; only intentional discrimination violates the constitution." *Id.*, at 1175.

Thus the approach of the Tenth Circuit to the Oklahoma City situation overlooks the importance of "local" control, *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977), and fails to recognize that the remedy is designed "to repair the denial of a constitutional right," and to operate only during the "interim period" when remedial adjustments are being made to eliminate the dual school system. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16, 28 (1971).[4]

The Tenth Circuit Court of Appeals – in requiring the District Court to reestablish control over the unitary

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[4] As to the Denver situation, "neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann, supra*, 402 U.S. at 31-32. "The clear import . . . from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.' " *Milliken I, supra*, 418 U.S. at 740-41.

school system in Oklahoma City, and in permitting the District Court to retain control over what appears to be a unitary school system in Denver – is in conflict not just with the decisions of other Courts of Appeals but with the fundamental decisions of this Honorable Court as well.

What these decisions clearly demonstrate is that every Court of Appeals ruling on the issue, save the Tenth Circuit, has held that once a school district has been found to be "unitary," it is always "unitary." Nothing, except demonstration of an "intent" to discriminate, will permit the federal courts to reimmerse themselves in the business of operating school districts. The instant decision of the Court of Appeals for the Tenth Circuit is clearly erroneous and should be reversed.

However, as much as such a ruling would narrowly resolve the case now before this Honorable Court, that ruling will not provide the critically needed relief from the inequities of improper federal court involvement in the management of school districts. It will not provide that relief because any Court of Appeals applying such a narrow ruling will find little authority for reversing the recalcitrant, if not wilful, fact-finder who refuses to pronounce a school district "unitary."[5]

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[5] That is exactly the refusal which so vexes the people of Denver. In *Wilfred Keyes, et al. and Congress of Hispanic Educators, et al. v. School District No. 1, Denver, Colorado, et al.*, 609 F. Supp. 1491 (D.C. Colo. 1985), the District Court declined to pronounce the Denver Public Schools "unitary" even though the Denver School Board had met every requirement established for it nearly 20 years before. Instead the District Court imposed a new injunction which it deemed "interim."

II. TRADITIONAL PRINCIPLES OF COMMON LAW PROVIDE BOTH THE MEANS OF DEFINING AND THE ALTERNATIVE TO DEFINING THE "UNITARY" SCHOOL DISTRICT AND ENDING DECADES OF JUDICIAL CONTROL OF THE NATION'S SCHOOL SYSTEMS.

A. Defining The "Unitary" School Districts Vexes Not Simply The Courts But The People Of The Districts Now Operating Under Judicial Control Of Their Schools.

A narrow ruling by this Honorable Court in the matter now before it poses other problems in addition to the not-so-hypothetical District Court for which proof of "unitariness" is well-nigh impossible. For regardless of the willingness of the fact-finder to conclude that a school district has met its constitutional obligations, district and appellate courts will continue to be confronted by the definitional difficulties of a word which this Honorable Court has yet to define and which may well be impossible to effectively define.[6]

Even if this Honorable Court were willing to describe what it means by "unitary," such subtle distinctions as may be necessary in such a definition may lead to further confusion. While trial-and-error applications of the decisions of this Honorable Court are the price the nation

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[6] The conclusion of Justice Potter Stewart on the difficulties of defining pornography comes instantly to mind: "I shall not today attempt further to define [hard-core pornography] . . . . But I know it when I see it. . . ." *Jacobellis v. Ohio*, 378 U.S. 184 at 197 (1964). How little different is the definition of "unitary" as that which "has no vestiges of a dual system." Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1707.

must pay for a federal judiciary which asks the involvement of this Honorable Court only when necessary to provide the requisite guidance in this area of the law, that price will be paid by millions of Americans – of all races – who are denied the control of their children's education.

In addition, a narrow holding by this Honorable Court will ensure continued confusion for years. This Honorable Court will be asked to resolve a progression of cases – beginning with that of the Denver Public Schools – which have never been pronounced to be "unitary" although meeting every possible element of such a definition.

Pronouncement, by this Honorable Court, of a precise definition of the "unitary" school district – one which lends itself to universal application, as a matter of law, by each reviewing Court of Appeals – is sought in the instant case, and is necessary, according to many thoughtful commentators. However, this Honorable Court may both effectively define the "unitary" school system and avoid the conundrum of defining "unitary" by the application of traditional principles of common law.

B. Traditional Principles Of Common Law Provide The Means Of Defining The "Unitary" School District – There Is No Need For A "New" And Policy-Driven Body Of Law.

The clearly erroneous application, by the Court of Appeals for the Tenth Circuit, of anti-trust law to the instant case reflects the degree to which the courts have struggled to isolate the body of law which will provide

guidance to desegregation cases. That search – in large part driven by policy – has led some to assert that a new body of law needs to be developed, a body of law devoted exclusively to achieving equality in our nation's schools.

Unfortunately the development of a "new" body of law permits the creating court to write on a *tabula rasa*, unconstrained by previous rulings of this Honorable Court in areas of the law deemed "inapplicable" to desegregation cases. Obviously the resort to the development of a "new" body of law is a refuge sought by those who disagree, on policy grounds, with where existing law requires the court to go. As a result, a court can travel practically anywhere its sense of justice takes it, since there are no charted waters in an "evolving" area of the law.[7] It is for these reasons that a return to the traditional principles of common law is so essential.[8]

C. Application of Traditional Principles of Common Law: *Res Judicata.*

Once a court finds liability and Constitutional violation, *i.e.*, an intentionally segregated school system, that

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[7] Obviously lost in all of this is Justice Oliver Wendell Holmes' admonition that his role was "to apply the law" not to "do justice." R. Bork, *The Tempting of America* (1990) at page 6.

[8] A thorough and well-reasoned analysis of the nature and elements of the desegregation litigation process, together with powerfully persuasive conclusions appeared in the Louisiana Law Review in 1989, and was relied upon in the preparation of this Brief *Amicus Curiae*. Beard, H., The Role of *Res Judicata* in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction, 49 La. L. Rev. 1989, hereinafter "Beard."

court must issue a remedial order designed to eradicate "root and branch"[9] the offending system and replace it with one not constitutionally offensive. However, once that order has been fully implemented and fully complied with by the local school board, the constitutional breaches must be deemed to have been corrected and the school system declared unitary. Rule 60(b) of the Federal Rules of Civil Procedure requires no less.

As one scholar has noted:

> The critical point . . . is that *res judicata* applies to the desegregation decree. Logically and necessarily flowing from this conclusion is the preclusion of a continuing and flexible modification of the decree, the operation of the "satisfaction" clause of Rule 60(b), and the holding in *Board of Education of Pasadena City Schools v. Spangler*. From this conclusion, the corollary that the finding of unitary status likewise is *res judicata* is a logical result. If *res judicata* did not apply, the desegregation decree could be modified at will, and rendered incapable of satisfaction. Hence, the dicta of *Swann v. Charlotte-Mecklenburg Board of Education*, and the holding of *Spangler I* would be incompatible with the fabric of the law.[10]

Just as in any other litigation, a final desegregation order contains findings of fact, conclusions of law – which identify the intentionally discriminatory conduct causing segregation and any vestiges of prior segregation

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[9] *Green v. County School Board of New Kent County*, 391 U.S. 430, 437 (1969).

[10] Beard, at 1241, notes omitted.

– and remedies, whether isolated or systemic.[11] The desegregation plan must entirely dismantle the dual school system and ensure a unitary school system. The court must assure that the plan "promises realistically to work, and promises realistically to work *now*."[12] In so doing, the court must do so with specificity and in sufficient detail:

> Rule 65(d) of the Federal Rules of Civil Procedure further requires that injunctions shall state their terms specifically and in reasonable detail. This rule must, of course, apply to desegregation orders as it would to any injunction. Possibly most important, however, and consistent with the commands of both equity and Rule 65(d), the remedy must be specifically tailored to the findings of constitutional violation.[13]

Res judicata applies not only to the final desegregation order but also to the determination of unitary status:

> Once the final desegregation order is formulated and approved, it has the effect of a final judgment under the doctrine of *res judicata*. The doctrine of *res judicata* teaches that "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are *thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.*" *Res judicata* is not a technical rule, but a fundamental rule of repose for both society and

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[11] Beard, at 1244.

[12] *Green, supra* 391 U.S. at 439. (Emphasis in original.) *See, Swann, supra* 402 U.S. at 13.

[13] Beard, at 1246. Notes omitted.

litigants. "[T]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." This language, used by the Supreme Court half a century ago, is even more compelling in view of today's crowded dockets.

The doctrine of *res judicata* applies to injunctions. This doctrine is consistent with, if not required by, the merger of law and equity accomplished by the Federal Rules of Civil Procedure. The doctrine of *res judicata* governs litigation brought under *Section 1983*, the statute under which almost all desegregation suits are authorized. The effect of *res judicata* extends to the findings of liability, the necessity of the remedy, the balancing of equitable interests, and the ultimate sufficiency of the decree to correct the violations. This is so because all of these issues are necessary parts of the decision whether to issue the injunction.[14]

* * *

> The doctrine of *res judicata* applies only where a final judgment adjudicating the rights of the parties has been entered. A judgment is final for purposes of *res judicata* and its corollaries when the court order adjudicates all of the rights and liabilities of all the parties. An injunction is such a final adjudication.[15]

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[14] Beard, at 1251, 1252, 1253 (notes omitted. Emphasis added.)

[15] *Id.* at 1254, 1255.

Beard's analysis of the application of *res judicata* to desegregation cases provides a helpful construct:

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While a court possesses the capability of modifying certain desegregation orders pursuant to Rule 60(b) of the

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When a school district has been involved in desegregation litigation in the past, the previous proceedings are part of this historical inquiry. Assume that in the past litigation, the court determined that there was official, intentional discrimination. No one appears to want *that* decision re-examined or relitigated. Subject to Rule 60(b), it is *res judicata*, and the determination is binding on the subsequent inquiry. Where the courts made that previous determination, the courts will have determined, secondly, what injuries the plaintiffs sustained as a result of the identified intentional discrimination. Those injuries may include current injuries and also conditions that continue to cause injuries in the future ("vestiges of segregation"). This second determination is also *res judicata*, though many appear to want *this* determination re-examined and to add more injuries and more existing conditions to its list.

Thirdly, the court will have determined what conduct was necessary to "remedy" the situation, to put the plaintiff in the place where the plaintiff would have been had the intentional discrimination not occurred ("remedy"). This may involve a payment of money ("damages"), or it may involve an order not to do certain specific and described acts or to do certain equally specified and described acts ("injunction" or "desegregation plan"). This is again *res judicata*, but whether this determination may be re-examined and relitigated is very much the question at bar.

The court may or may not have made a fourth determination: whether the conduct required by the third determination ("remedy") has been implemented. Where this determination has already been

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Federal Rules of Civil Procedure under certain prescribed circumstances, particularly since all equitable decrees are

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made, it is also *res judicata*. Whether this determination may be relitigated has not been widely debated because its significance depends almost exclusively on the binding nature of the third determination.

If the court's second determination ("vestiges") is *res judicata*, then injuries that the court had not previously found to have resulted from the intentional official discrimination cannot be subsequently examined (except under Rule 60(b)) as having been possibly caused by that discriminatory conduct. A succeeding court should not then find these conditions to be constitutionally offensive unless it independently finds them to have been caused by intentional official discrimination.

If the court's third determination ("remedy") is *res judicata*, then only the conduct required by that determination – the payment of money or the doing or avoiding of certain acts – was necessary to correct the identified injuries, again, except as modified under Rule 60(b). And, as a logically necessary corollary, the performance of that conduct did in fact correct the previously identified injuries and satisfy the previously imposed obligation.

If the injuries found to have resulted from the previously identified intentional discrimination have been subsequently corrected, then the current state of affairs cannot result from the intentional discrimination previously identified, and the examining court is back to square one.

A *de novo* review of the unitary status of a school district logically denies the operation of *res judicata*

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modifiable, as are all judgments in law or equity under the Federal Rules of Civil Procedure, the ability of a District Court, after sixteen years, to characterize its continued oversight as an "interim decree," is highly suspect:[16]

> A district court may not preclude the effects of "finality" by declining to enter a "final" decree and labeling its order as "provisional" or "interim," or by retaining the power to modify without the showing required by Rule 60(b). The "inherent limitation upon federal judicial authority" emphasized by the Court in *Swann, Spangler I, Milliken I,* and other Supreme Court decisions, cannot be evaded merely by a court declaring that it retains power to modify its orders from time to time as it deems circumstances might require. Additionally, such provisions cannot thwart the mandate of *Green* that the time for deliberate speed had ended and that orders must "promise realistically to work, and . . . to work *now*." An order that promises realistically to work *"now"* necessarily precludes an order that a court deems insufficient and intends to modify in the future. A plan which the court knows may require modification is not

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in the second and third determination ("remedy"), and often re-examines the second determination ("vestiges").

Beard, at 1282-83.

[16] Memorandum Opinion and Order of the United States District Court for the District of Colorado, October 6, 1987. *Wilfred Keyes, et al. and Congress of Hispanic Educators, et al. v. School District No. 1, Denver, Colorado, et al.*, Nos. 85-2814 and 87-2634 on appeal from United States Court of Appeal for the Tenth Circuit, (January 30, 1990).

> a plan that honestly and realistically promises to work – now or at any other time.[17]

The limited authority of a district court to modify its outstanding injunctive decrees "is not a substitute for an appeal. It does not allow relitigation of issues that have been resolved by the judgment."[18] This Honorable Court has made very clear: "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions at its making. We are not at liberty to reverse under the guise of readjusting."[19]

The decision on whether or not a school system has achieved "unitary" status might best be answered by reference to traditional principles of common law. For example, the first clause of Rule 60(b)(5) of the Federal Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (5) the judgment has been satisfied, released, or discharged . . . .

Thus, when the defendants have fully and faithfully implemented all aspects of the final order approved and modified by the court, the school district has achieved "unitary" status and should be so declared.

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[17] Beard, at 1257 (footnotes omitted).

[18] 11 Moore's Federal Practice and Procedure § 2863, at 206.

[19] *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

The traditional doctrine of *res judicata* and the satisfaction of judgment clause of rule 60(b)(5), has been utilized in areas outside desegregation law, particularly in environmental law.[20] In addition, these principles have been utilized by this Honorable Court in *Pasadena Board of Education v. Spangler*,[21] as well as by the Courts of Appeals for the First and Ninth Circuits.[22]

D. Summary

Desegregation cases want not for the development of new legal principles to guide the Courts of Appeals and District Courts, but merely for the application of traditional principles of common law to the desegregation actions brought before them. Defining the school district as "unitary" is problematic at best, but is less so when defined in the context of conventional litigation following traditional common law principles.

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[20] *Environmental Defense Fund, Inc. v. Hoffman*, 566 F.2d 1060 (8th Cir. 1977); *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 342 F. Supp. 1211, 1218 (E.D. Ariz.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); *Sierra Club v. Mason*, 365 F. Supp. 47 (D. Conn. 1973); and *Sierra Club v. U.S. Army Corps of Engineers*, 609 F. Supp. 1052 (S.D.N.Y. 1985).

[21] 427 U.S. 424 (1976).

[22] *Spangler II*, 611 F.2d 1242 (9th Cir. 1979) and *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).

III. FAILURE TO APPLY TRADITIONAL PRINCIPLES OF COMMON LAW TO THE DENVER PUBLIC SCHOOLS HAS CONDEMNED THE PEOPLE OF DENVER TO TWENTY YEARS OF CONTROL OF THEIR SCHOOLS BY THE FEDERAL COURTS.

The need for this Honorable Court to adopt an expansive ruling in the instant case – in order to resolve a highly uncertain and controversial area of the law – is best revealed by examining the history of litigation regarding the Denver Public Schools.

For 20 years the Denver Public Schools have been under the control, not of the people of Denver and their elected representatives on the Denver School Board, but of the federal judiciary. Notwithstanding the fact that the Denver Public Schools have done everything asked of them – and the fact that Denver Public Schools are among the most integrated of major public school systems[23] – the District Court has declined to pronounce the Denver Public Schools to be "unitary" and in fact, has maintained permanent control of the Denver Public Schools.

For 20 years the agony of court management of the Denver Public Schools and its devastating impacts upon the people of Denver – of all races – has been played out in the local media. A sampling of headlines gives but a

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[23] F. Welch and A. Light, *New Evidence On School Desegregation*, 78-82 (Table A-2 (U.S. Gov't Printing Office, 1987)).

Rocky Mountain News, Jan. 15, 1989, at 7, col. 1 describing findings of University Chicago research.

hint of the struggle, soul searching, pain, outrage, experimentation, expense, fear, hope, frustration and exasperation experienced by the citizens of Denver. Of particular poignance is the notice dated October 25, 1985, of the 20th anniversary observance of the original plaintiffs, the children of whom are long gone from the Denver Public School System.

Branscombe, *Integration Blamed For 'White Noose'*, Denver Post, May 25, 1975, at 1A, col. 1.

Few Favor Busing, Poll Finds, Denver Post, June 16, 1975.

Cox, *Suburbs Must Integrate Or Denver Cannot, Expert Says*, Denver Post, Jan. 1, 1981, at 1, col. 1.

Branscombe, *Bradford, Public Opinion Against Busing Growing*, Denver Post, Apr. 25, 1981, at 24, col. 1.

Branscombe, *Residential Integration Called Solution To School Integration*, Denver Post, Mar. 14, 1982, at 1, col. 1.

Branscombe, *Denver Public Schools May Push Mixed Housing*, Denver Post, Nov. 7, 1982, at 2, col. 1.

Branscombe, *New Segregation Plan Unveiled*, Denver Post, Mar. 13, 1983, at 1B, col. 1.

Branscombe, *Housing Sales Touted As Aid In Integration*, Denver Post, May 13, 1983, at 5B, col. 1.

Bingham, *Panel Of Blacks To Scrutinize School Busing*, Denver Post, Nov. 16, 1984, at 1A, col. 5.

Weaver, *Busing Triggered White Flight? Truism Being Debunked By Experts*, Denver Post, Mar. 14, 1985, at 1E, col. 6.

Enda, *Cost of Busing Fight Raises Ire*, Rocky Mountain News, May 1, 1985, at 6, col 1.

School Desegregation: A Settlement Near?, Denver Post, June 10, 1985, at 1A, col. 16.

Bingham, *Denver Public Schools Drafts Bold Goals To End Integration Suit*, Denver Post, June 13, 1985, at 1A, col. 1.

Bingham, *Group Notes 20th Anniversary of Denver Desegregation Suit*, Denver Post, Oct. 25, 1985, at 1B, col. 1.

Quality of Education, Not Integration, Concerns Denver Hispanics, Denver Post, Dec. 8, 1985, at 1C, col. 1.

Bingham, *Public Housing A Key Factor in School Segregation*, Denver Post, Jan. 1, 1986, at 3B, col. 1.

Bingham, *Desegregation Suit Legal Fees Soaring*, Denver Post, Jan. 26, 1986, at 1B, col. 5.

Bingham, *Housing Plans Raise Desegregation Worry*, Denver Post, June 21, 1986, at 3B, col. 3.

Flynn, *Integrated Housing Urged To End Busing*, Rocky Mountain News, Feb. 26, 1987, at 34, col. 2.

Schools Set Rules To Curb Racism, Denver Post, Apr. 4, 1987.

Bingham, *City Plan: Forget Busing Integrate Neighborhood Schools*, Denver Post, Nov. 6, 1987, at 2A, col. 1.

Weiss, *Housing Authority Shopping South*, Rocky Mountain News, Feb. 27, 1989, at 1, col. 6.

Soergel, *Schools, White Flight Still Shape Denver*, Rocky Mountain News, Mar. 12, 1989, at 34, col. 1.

Bingham, *Neighborhood Changes Merit End To Busing, Parents Say*, Denver Post, Apr. 7, 1989, at 4B, col. 1.

CONCLUSION

From the earliest days of the Republic, management of the public schools has been exclusively local. It is education of our children that strikes closest to home. After all, it is our children we are entrusting to this particular function of government. It is the future leaders of our community and nation who will emerge from our schools. And it is the taxes on our homes and properties that pay for those schools.

As was noted by the Ninth Circuit in *Spangler v. Pasadena City Board of Education*, "The Displacement of local government by a federal court is presumed to be temporary."[24] As Judge (now Justice) Kennedy concluded, "when a court ordered remedy has accomplished its purpose, jurisdiction should terminate . . . [since] [f]urther delay in returning full responsibility for administration to the school board is unjustified."[25]

This Honorable Court must end the uncertainty, not only for the Oklahoma City Public Schools, but also the Denver Public Schools and all other public school systems similarly situated which – having met every demand made of them, having fulfilled every requirement of the litigation through which they have passed – are, unlike other similarly situated litigants, still under the control of the federal judiciary.

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[24] *Spangler, supra* at 1241.

[25] *Id.* at 1242 and 1244.

Dated this 1st day June 1990.

Respectfully submitted,

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No. 89-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

—v.—

ROBERT L. DOWELL, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

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v.

ROBERT L. DOWELL, et al.,

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Consent of Parties

Petitioner and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was established in 1963 at the request of President Kennedy to help assure civil rights to all Americans by affording legal services otherwise unavailable to minorities and the poor pursuing claims for equal treatment under the law. The Lawyers' Committee is a non-profit private corporation that has enlisted the services of thousands of members of the private bar in cases involving voting, education (including school desegregation), employment, housing, municipal services, the administration of justice and law enforcement.

The Lawyers' Committee has a long history of direct support of and participation in cases in the federal courts furthering school desegregation. *E.g.*, *Board of Education* v. *Harris*, 444 U.S. 130 (1979); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Missouri* v. *Jenkins*, ____ U.S. ____, 110 S. Ct. 1651 (1990).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. In pursuit of those goals, the ACLU has been involved in numerous discrimination cases throughout its seventy-year history. Currently, the ACLU is representing respondents in two school desegregation cases that are pending before this Court on petitions for certiorari. *Freeman* v. *Pitts*, No. 89-1290; *Bd. of Educ. of Topeka* v. *Brown*, No. 89-1681.

The American Jewish Congress is a national organization of American Jews founded in 1918 to protect the civil, religious and economic rights of Jews and all Americans. It has filed briefs in many of the Court's school desegregation cases.

This Court's decision will undoubtedly have significant implications in other school desegregation cases. *Amici* submit that their experience in school desegregation litigation enables them to provide a perspective different from the parties and other *amici* on the issues before this Court.

SUMMARY OF ARGUMENT

This case requires the Court, for the first time, to set forth the standards that district courts should apply in deciding whether to dissolve school desegregation decrees.

It has been more than thirty-five years since this Court in *Brown I* stated unequivocally that the United States Constitution requires public school districts to dismantle dual race school systems. Over that time span, this Court and the other federal courts have confronted circumstances requiring the imposition of court-ordered remedies to assure compliance by school districts with their constitutional obligations. In articulating the standards for determining the appropriateness and terms of such remedies, this Court has consistently applied traditional equitable principles.

An equitable remedy should only be granted to a plaintiff, and imposed on a defendant, if and to the extent necessary to give the plaintiff relief to which he or she is entitled. This Court after *Brown II* thus provided *de jure* segregated school districts numerous opportunities and lengthy periods of time to act "with all deliberate speed" to meet their obligations under the Fourteenth Amendment. Courts decreed the implementation of specific school desegregation plans only after school districts did not and would not implement effective steps to eliminate dual systems, making painfully clear that the constitutional rights of school children could not be vindicated without injunctive relief. The case now before this Court followed precisely this oft-repeated pattern.

This Court has used the term "unitary" to describe a school system in which the objectives to which a school desegregation decree is directed—the elimination of school segregation and its vestiges "root and branch" so that there is assurance the school system will remain free from discrimination—have been fulfilled. As in any case involving equitable remedies, plaintiffs in school desegregation cases are entitled to enforcement of the court's decree until and unless those objectives have been fulfilled. Thus, school boards that seek relief from the compulsion of injunctions bear the substantial burden—borne by any defendant who

seeks dissolution of an injunction—of proving that the injunction is no longer necessary to assure the plaintiffs the relief that is their right.

This Court has not, to date, directly set forth the specific circumstances that would allow proper findings of "unitariness" justifying dissolution of the injunctions that finally forced school districts to comply with their constitutional obligations. Nevertheless, the factors to be applied can be readily derived if the constitutional objectives and equitable principles that have guided this Court's previous examination of school desegregation remedies continue, as they must, to be applied. The application of equitable principles in determining the duration of school desegregation decrees is consistent with concerns of federalism and local control of public education. This Court has always taken those concerns into account when defining the purposes and appropriate scope of school desegregation decrees, and they are not valid bases for now *re*defining the objectives to which the decrees were directed or otherwise departing from traditional equitable principles applicable to the modification or dissolution of decrees.

Because prevailing plaintiffs in school desegregation cases are entitled to an assurance of a unitary school system, mere compliance with the terms of a desegregation decree can hardly be dispositive of whether an injunction should be dissolved or remain in place. This Court has never used the term "unitary" to describe such mere compliance. Rather, a school board seeking dissolution of a desegregation decree must demonstrate that the vestiges of a dual system have been eliminated and that the school district will operate an integrated, nondiscriminatory school system without the compulsion of an injunction. Only then will the school board have fulfilled its constitutional obligation to effectuate a transition from a dual school system to a "unitary" system.

Point II of this brief sets forth a series of factors that should be weighed in a factual inquiry by district courts to determine whether "unitariness" has genuinely been achieved, thereby justifying dissolution of a desegregation

decree. Promulgation by this Court of such factors, as in prior desegregation cases, would guide the lower courts in the use of their equitable powers to achieve the mandates of *Brown I*. These factors are designed to test whether school authorities are currently operating the district on a completely non-racial basis, and whether structural reforms have been instituted to assure that the vestiges of a dual school system will not reappear if the decree is dissolved. In addition, these factors direct the district courts to determine whether, if the injunction is dissolved, the school authorities will institute changes that will have a predictably segregative effect; if such is the case, particularly with regard to pupil assignments, the district courts must be satisfied that the changes are necessary to achieve a compelling governmental interest that cannot be achieved by other means that have less, or no, segregative consequences.

As in any motion to dissolve an injunction, the burden of proof remains on the defendant school district to establish that a desegregation decree is no longer necessary. The showing that school districts must make to meet their burden is a stringent one, and properly so, both in view of the burden that equity traditionally places on defendants seeking dissolution of the plaintiff's remedy, and the history of school desegregation litigation that required injunctions to be entered in the first place. It is, nevertheless, a showing that is quite feasible for a school district that has established a genuine unitary school system, and not merely complied with the specific directives of a court order.

The Oklahoma City desegregation decree was not properly dissolved by the district court because the school board never met its burden of establishing that such dissolution is justified. The district court's reference to "unitary" schools in Oklahoma City in 1977 was, at most, a finding that the injunction was effective in compelling the school district to operate in a nondiscriminatory manner. The district court did not then conduct a proper inquiry as to whether the injunction should be dissolved, and the mere incorrect use of the term "unitary" does not change this result. The district court's 1987 ruling formally dissolving the injunction simi-

larly was not based on a satisfactory showing by the school district with respect to the relevant factors; indeed, as in 1977, the school board and the court largely did not address those factors. Most conspicuously, the school district failed to demonstrate the compelling necessity and unavoidability of reverting to essentially the *same* segregative neighborhood elementary school plan that, prior to the entry of the injunction, was rejected by the district court because it perpetuated the dual school system that the injunction was intended to eliminate.

The correct resolution of this case requires that the district court's improper dissolution of the decree be vacated, thereby reinstating that court's jurisdiction. Because the Circuit Court's judgment accomplishes this result, it should be affirmed, and the district court should exercise its jurisdiction in accordance with the standards set forth by this Court.

ARGUMENT

I

A SCHOOL DESEGREGATION DECREE CAN BE DISSOLVED ONLY WHEN THE OBJECTIVES TO WHICH IT WAS DIRECTED—THE ELIMINATION OF RACIAL DISCRIMINATION "ROOT AND BRANCH" SO THAT A UNITARY SCHOOL SYSTEM IS ASSURED—HAVE BEEN FULFILLED

A. A School Desegregation Decree Is A Permanent Injunction And, As Such, Cannot Be Dissolved Until The Objectives To Which It Was Directed Have Been Fulfilled.

1. School desegregation decrees are governed by traditional principles of equitable relief.

Since *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*), this Court has established that "[i]n fashioning and effectuating [desegregation] decrees, the courts will be

guided by equitable principles." *Id.* at 300. *See, e.g.*, *Milliken* v. *Bradley*, 418 U.S. 717, 737-38 (1974) (*Milliken I*). This has remained "the basic rule which governs to this day." *Milliken* v. *Bradley*, 433 U.S. 267, 279 (1977) (*Milliken II*).

Thus, in *Brown II*, the "segregation cases" were remanded to the district courts for the "exercise of . . . traditional attributes of equity power." *Brown II*, 349 U.S. at 300. This Court instructed the district courts to "retain jurisdiction of these cases" and "to take such proceedings and enter such orders and decrees . . . as are necessary and proper to admit [children] to public schools on a racially nondiscriminatory basis with all deliberate speed." *Id.* at 301.

Consistent with principles of equity, courts did not enter injunctive orders until they determined that school children plaintiffs could not otherwise obtain the relief to which they were entitled. School districts were given ample opportunity and time after *Brown II* to bring themselves into compliance with the Constitution. Consequently, when certain school districts failed to take constructive steps towards the elimination of discrimination, this Court declared in 1968 that "[t]he time for mere 'deliberate speed' has run out" and "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green* v. *County School Board*, 391 U.S. 430, 438-39 (1968). Consistent with the equitable principles incorporated in *Brown II*, the Court observed that "[t]he obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation." *Id.* at 439.

Three years later, this Court, in upholding equitable desegregation decrees, stated that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to necessities of the particular case," and that "[i]f school authorities fail in their affirmative obligations under [*Brown* and its progeny], judicial authority may be invoked." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The Court explained that "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16.

It was pursuant to the very invocation of equitable authority mandated by *Green* and *Swann* that the district court for the Western District of Oklahoma entered the desegregation decree (the "Finger Plan") now at issue in this case. *Dowell* v. *Board of Education*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). In 1972, the district court found that the Oklahoma City School Board had "totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own," and noted the "unpardonable recalcitrance of the Defendant Board and the Superintendent of Schools." *Id.* at 1271. Recognizing "that those students who have been and are being subjected to segregated education in the public schools are, regardless of race, having thrust upon them educational infirmities which are constitutionally impermissible," the district court would not "tolerate further delay" in steps necessary to effectuate a transition to a nondiscriminatory school system. *Id.*

2. An equitable injunction, including a school desegregation decree, cannot be dissolved unless the objectives that made entry of the injunction necessary have been fulfilled.

It is a fundamental principle of equitable relief that a permanent injunction will not be dissolved unless the objectives to which the injunction was directed—including elimination of the conditions that made the injunction necessary—have been fulfilled. This principle was articulated by this Court in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), where Justice Cardozo set forth that dissolution of an injunction is inappropriate unless the "dangers" addressed by the decree have "become attenuated to a shadow," *id.* at 119, thereby permitting a release of the defendant from the burdens of compliance without "prejudic[ing] the interests of the classes whom [the] restraint was intended to protect." *Id.* at 117-18. In *Swift*, the Court also ruled that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" allows even a modification—as opposed to

a complete dissolution—of what was decreed. *Id.* at 119. Moreover, Justice Cardozo warned against allowing motions for dissolution or modification to be used as a means to relitigate the validity of, and ultimately reject, the objectives that the injunction was intended to secure "under the guise of readjusting." *Swift*, 286 U.S. at 119.

The standards for dissolution of injunctions, articulated in *Swift*, derive both from fairness and common sense: where an injunction has been entered in response to particular conditions, the injunction should only be dissolved if those conditions have been eliminated. A permanent injunction is designed to prevent a harm; if the conditions or institutions giving rise to the harm remain, then simply dissolving the injunction and ending court jurisdiction serves no equitable purpose. An injunction should only be dissolved if it is no longer necessary to secure relief to which the plaintiff is entitled.

This Court has never deviated, in any context, from the equitable principles, articulated in *Swift*, that an injunction cannot be dissolved unless the objectives to which it was directed have been fulfilled, nor modified except to further those objectives.[1] This Court and the lower courts have, in certain cases, required less than a showing of "grievous wrong evoked by new and unforeseen conditions" to allow modifications that *further* equitable objectives; however, the fundamental principle underlying *Swift*—that the objectives to which the injunction was directed must be pursued—has not been limited. Thus, in *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), though this Court granted the government's motion to modify an injunction to impose *more* onerous limitations on the enjoined party, the Court also expressly observed that, consistent with *Swift*, a

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1 In modern cases where a party seeks to dissolve or modify a permanent injunction, relief has normally been sought under Rule 60(b) of the Federal Rules of Civil Procedure, which incorporates into the Federal Rules the equitable principles, articulated in *Swift* and its progeny, governing dissolution and modification of injunctions. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2863; 7 Moore, *Moore's Federal Practice* ¶ 60.26[4].

decree "may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Id.*, 391 U.S. at 248 (emphasis in original). Rather than reject *Swift*, the Court in *United Shoe* noted that "[t]he present case is the obverse of the situation in *Swift* if the Government's allegations [that a more stringent decree is needed to effectuate the purposes of the order] are proved." *Id.* at 249.[2] Nothing in *United Shoe* undermines the application of *Swift* in circumstances where "the defendants [seek] relief not to achieve the purposes of the provisions of the decree, but to escape their impact." *Id.*

Similarly, in *System Federation No. 91 Railway Employees' Dep't* v. *Wright*, 364 U.S. 642 (1961), though this Court allowed a decree to be modified, it did not limit the application of the fundamental principles articulated in *Swift* where the objectives to which the injunction was directed have not been fulfilled. Rather, in *Wright*, the modification of a decree barring "union shop" labor agreements on certain rail lines was found appropriate because the federal Railway Labor Act had been amended, subsequent to the granting of injunctive relief, to make lawful the very activity—"union shop" agreements between railroads and labor unions—prohibited by the decree. Clearly, the circumstance warranting imposition of the injunction—the illegality of "union shop" agreements under the Railway Labor Act—had been eliminated. In *Wright*, the Court attributed the very power of a district court to modify a decree to "the fact that an injunction often requires continuing supervision by the issuing court" to achieve the objectives for which the injunction was entered "on behalf of the party who obtained that equitable relief." *Id.* at 647.[3]

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2 *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 602 (1973) (*United Shoe* "has said that the thrust of the *Swift* test is based not so much on the harm being suffered by the enjoined party but on the continuing need for the injunction").

3 The lower federal courts have not deviated from the principles that absent a showing that a decree is no longer necessary, or that modification

(*footnote continued on next page*)

Consistent with the equitable principles for dissolution of injunctions, this Court has recognized that district court

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(*footnote continued from previous page*)

will further the objectives to which the decree was directed, an injunction will not be dissolved or modified. In certain cases, application of these principles has resulted in denial of motions for dissolution or modification. *See, e.g.*, *Mayberry* v. *Maroney*, 558 F.2d 1159 (3d Cir. 1977) (denying State of Pennsylvania's motion for modification of a previous consent order enjoining the state from confining inmates in a basement facility at a state penitentiary); *Ridley* v. *Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970) (denying oil company's motion to dissolve an injunction that restrained it from disconnecting a gas line); *Humble Oil & Refining Co.* v. *American Oil Co.*, 405 F.2d 803 (8th Cir.) (Blackmun, J.), *cert. denied*, 395 U.S. 905 (1969) (denying motion to modify an injunction restraining oil companies from using certain trademarks and names).

In other cases, where motions to dissolve or modify have been granted, courts have similarly not deviated from the principle that dissolution or modification in contravention of the purposes of the injunction is not appropriate. *See, e.g.*, *United States* v. *City of Chicago*, 663 F.2d 1354, 1360 (7th Cir. 1981) ("[t]he standard for modifications and injunctions that emerges from *Swift* and *United Shoe* . . . incorporates consideration of whether there remains any need to continue the injunction, that is, whether 'the purposes of the litigation as incorporated in the decree' have been achieved"); *New York State Ass'n for Retarded Children* v. *Carey*, 706 F.2d 956, 970 (2d Cir.), *cert. denied*, 469 U.S. 915 (1983) (Friendly, J.) (granting modification of injunction addressing conditions at state community care facilities, where modification offered an improved means of achieving the "desired objectives" to which the injunction was directed); *Heath* v. *De Courcy*, 888 F.2d 1105, 1108 (6th Cir. 1989) (allowing modification of consent decree designed to limit overcrowding in prisons where modification did "not increase the risk to inmates" that was the subject of the decree); *Hodge* v. *Dep't of Housing & Urban Dev.*, 862 F.2d 859, 861 (11th Cir. 1989) (dissolution of injunction, mandating compliance with certain notice and hearing requirements for proceedings relating to payments by tenants for damaged property, permissible if new statutes mandate compliance with the terms of the decree); *King-Seeley Thermos Co.* v. *Aladdin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (modification of an injunction permissible where "the decree is not properly adapted to accomplishing its purposes"; power to modify should be exercised sparingly). Cases such as these have addressed "the preferable means for achieving the ends to which the decree was intended," not "whether the proposed modification would or would not derogate the primary objective of the decree." *Benjamin* v. *Malcolm*, 564 F. Supp. 668, 686 (S.D.N.Y. 1983). *See also Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (courts have not deviated from "the *Swift* principles that a modification should not vitiate the decree").

jurisdiction in school desegregation cases will end "[a]t some point," but only when "school authorities . . . have achieved full compliance with this Court's decision in *Brown I*." *Swann*, 402 U.S. at 31. In the past, as remains true today, there is no basis for a conclusion that school desegregation decrees should be dissolved before the objectives to which they are directed have been fulfilled.[4] Nor should the objectives defined in *Brown* and its progeny now be re-evaluated under the guise of dissolution or modification. Rather, upon a motion to dissolve or modify, the proper exercise of equitable power requires a determination whether those objectives have been achieved.

B. The Objectives To Which A School Desegregation Decree Is Directed Are The Elimination Of Racial Discrimination And Its Vestiges From The School System "Root And Branch" So That A "Unitary" School System Is Assured.

1. A school system becomes "unitary" when the objectives to which a desegregation decree is directed have been achieved.

School desegregation decrees have been entered where school districts failed to fulfill their affirmative duty, under

4 In *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976), this Court did order that a desegregation decree be modified, but only to eliminate provisions that were determined, based on the intervening decision of this Court in *Swann*, to be outside the scope of the district court's power to remedy *de jure* segregation. *Spangler* thus did not address the standards for modifying or dissolving valid desegregation decrees. This Court, however, did set forth that the "well established rules governing modification of even a final decree entered by a court of equity" apply to desegregation injunctions. *Id.* at 437 (criticizing judge on Court of Appeals for "overlook[ing]" those "well established rules"). Citing *Swift*, *Wright* and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), this Court reiterated that "[t]he source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Spangler*, 427 U.S. at 437 (*quoting Wright*, 364 U.S. at 647). It would be as inequitable as it would be illogical to dissolve a desegregation decree before eradication of the conditions making necessary the "continuing supervision by the issuing court."

the Fourteenth Amendment, "to effectuate the transition to a racially nondiscriminatory system." *Brown II*, 349 U.S. at 301. This Court has used the term "unitary" to describe a school system that has completed effectively the obligatory transition from a previously *de jure* segregated (or "dual") school system. Under the Fourteenth Amendment, "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Green*, 391 U.S. at 436.

The term "unitary" in and of itself derives legal significance in school desegregation cases from its use as a jurisprudential "term of art." As such, it is plain that a school system only becomes "unitary in the sense required by [this Court's] decisions" when school authorities "have achieved full compliance with this Court's decision in *Brown I*." *Swann*, 402 U.S. at 31. The Court has thus explained that:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. . . . That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."
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> — *Swann*, 402 U.S. at 15.

See also Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449, 458 (1979).

The reason that school districts are required to eliminate racial discrimination "root and branch" is that the objective is not creation of desegregated systems that are ephemeral or that exist only by reason of an injunction's compulsion. Rather, the objective is a school system whose unitary status is assured:

> As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer accept-

able remedies, a district court has broad power to fashion a remedy that *will assure a unitary school system.*

— *Swann*, 402 U.S. at 16 (emphasis added).

Accordingly, the objective to which desegregation decrees are directed—and the fulfillment of which would justify dissolution of a decree—is nothing less than "a unitary system in which racial discrimination would be eliminated root and branch," *id.* at 15, and, therefore, whose unitary status is assured in the absence of a decree.

This Court has not wavered in its recognition of the constitutional obligation of school boards to eliminate discrimination and its vestiges "root and branch." *See, e.g., Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 200 (1973); *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 537 (1979) (*Dayton II*). The school board's "continuing 'affirmative duty to disestablish the dual school system' is . . . beyond question." *Columbus*, 443 U.S. at 460 (1979) (citation omitted).

It is equally clear that the school district's affirmative duty to eliminate racial discrimination root and branch and assure a unitary school system is not a modest one, and that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation." *Swann*, 402 U.S. at 26. It is now beyond dispute that "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination." *Milliken II*, 433 U.S. at 283. *See also Keyes*, 413 U.S. at 203. For this reason, "[f]ederal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system." *Milliken II*, 433 U.S. at 283.

Thus, nondiscriminatory reassignment of students alone has never been treated as defining a unitary school system. *Green* recognized that "existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities and facilities were among the most important indicia of a segregated system." *See Swann*, 402 U.S. at 18 (*citing Green*, 391 U.S. at 435). *See also United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969). Where, for example, it has not been established that procedures for hiring and promoting teachers and administrators in a school district have been rid of the vestiges of racial discrimination, "it may well be that [the school board has] not yet totally achieved the unitary system contemplated by . . . *Swann*." *Spangler*, 427 U.S. at 436. In *Milliken II*, this Court upheld a school desegregation decree that addressed remedial programs, testing, in-service teacher training and counseling, explaining that the decree "was aptly tailored to remedy the consequences of the constitutional violation" because "[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation." *Id.* at 287.

Indeed, segregated pupil assignments are often themselves only a reflection of systemic vestiges of a long-standing regime of *de jure* segregation, such as "the community and administration attitudes toward the school." *Keyes*, 413 U.S. at 196. At the same time, school desegregation can itself breed segregation in other areas, such as housing. As the Court unanimously recognized in *Swann*:

> Over the long run, the consequences of the choices [made by the school board] will be far reaching. . . . The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. . . . In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. . . . [A discriminatory school location policy] does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races.
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> — *Swann*, 402 U.S. at 20-21.

The term "unitary" thus encompasses a far-reaching constitutional obligation of the school board. If students have a "constitutional right . . . to attend a unitary school system," *Milliken I*, 418 U.S. at 746, then a definition of "unitary" that requires less than the fulfillment of the school district's affirmative duties can only undermine the very constitutional rights this Court has sought to protect in mandating school desegregation plans.

2. Mere compliance for a period of time with the particular terms of a desegregation decree does not, of itself, make a school system unitary; rather, the conditions in and affecting the school system must be such that there is assurance the school system will be unitary in the absence of a court injunction.

Consistent with the affirmative duty to remedy the constitutional violation of *de jure* segregation by eradicating discrimination and its vestiges "root and branch," mere compliance for a period of time with the terms of a school desegregation decree has never been equated by this Court with the creation of a unitary school system. School desegregation decrees were not meant to limit the affirmative duties of school boards; rather, the decrees were meant to *assure* that those duties would be fulfilled. *Swann*, 402 U.S. at 16. In this case, the district court implemented a desegregation decree as "another *step* in the struggle to implement the constitutional imperative for a unitary school system in the Oklahoma City School District." *Dowell*, 338 F. Supp. at 1258 (emphasis added).

The objectives to which a desegregation decree is directed, then, are only fulfilled when there is assurance that the school district will be unitary in the absence of a court injunction. The district courts have had "not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*" *Green*, 391 U.S. at 438 n.4 (emphasis added) (*quoting Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). For example, "[i]n

devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that *future* school construction and abandonment are not used and *do not serve to perpetuate or re-establish the dual system.*" *Swann*, 402 U.S. at 21 (emphasis added). *See also Columbus*, 443 U.S. at 459-61; *Dayton II*, 443 U.S. at 258.

Moreover, although desegregation decrees serve remedial functions, this "does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system." *Milliken II*, 433 U.S. at 290 (emphasis in original). Even after a desegregation decree has been entered, the school board remains "under a continuous constitutional obligation to disestablish its dual system," and "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus*, 443 U.S. at 459. *See also Missouri* v. *Jenkins*, ____ U.S. ____, 110 S. Ct. 1651, 1666 (1990).[5]

School desegregation injunctions, like other equitable decrees, "require[ ] continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Spangler*, 427 U.S. at 437. *See* p. 12 n.4, *supra*. This Court has always held that "whatever plan is adopted will require evaluation in practice, and the court should

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5 It is thus inappropriate to distinguish school desegregation decrees as being "remedial" rather than "prohibitive." *Compare Spangler* v. *Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 (9th Cir. 1979) (Kennedy, J., concurring). The "remedy" for long-term *de jure* segregation, as this Court has recognized, includes prospective application of the decree—so that a dual school system will not re-emerge—until discrimination and its vestiges have been eradicated "root and branch." *See Milliken II*, 433 U.S. at 290 (components of decree which operate prospectively "are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained"). This Court has recognized that school desegregation decrees can more appropriately be distinguished from "punitive" relief. *See Milliken II*, 433 U.S. at 288 ("[t]he order does not punish anyone").

retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Green*, 391 U.S. at 439. *See also Brown II*, 349 U.S. at 294; *Swann*, 402 U.S. at 21.

Compliance with the terms of a desegregation decree for a period of time, with nothing more, does not assure that a dual system will not re-emerge in the absence of the decree. *See, e.g., Riddick* v. *School Board*, 784 F.2d 521, 533 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986) ("the mere implementation of a desegregation plan does not convert a dual system into a unitary one"). Such compliance of itself does not justify dissolution of the decree and the termination of court jurisdiction.

C. The Application Of Equitable Principles To The Dissolution Or Modification Of Desegregation Decrees Is Not Limited By Principles Of Federalism And The Value Of Local School Board Autonomy, But Instead Takes Those Factors Into Account.

The exercise of equitable powers by federal courts in school desegregation cases has always taken account of principles of federalism, and, therefore, concern for local control of public education has been a premise for the use of equitable relief. In *Brown II*, this Court recognized that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving" the varied local school problems encountered in the full implementation of the constitutional principles articulated in *Brown I*. *See Brown II*, 349 U.S. at 299. It was for this very reason that the district courts were instructed to exercise their equitable powers: "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* at 300.

Since *Brown II*, this Court has continually recognized, and never ignored, that "local autonomy has long been thought essential to both the maintenance of community concern and support for public schools and to quality of the education process." *Milliken I*, 418 U.S. at 741. It has only been with express recognition of the value of local autonomy in public

education that this Court has upheld the imposition of equitable desegregation decrees. As this Court has explained, "[i]t is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). *See also Milliken I*, 418 U.S. at 744.

Thus, in *Swann*, this Court could affirm the imposition by a district court of racial balances, altered attendance zones and a student transportation plan while recognizing that "[s]chool authorities are traditionally charged with broad power to formulate and implement education policy." *Swann*, 402 U.S. at 16.

Similarly, in *Milliken II*, this Court could uphold broad remedies relating to remedial programs, testing, teacher training and counseling while reiterating that "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81. Aware of the "inherent limitation upon federal judicial authority," this Court expressly found that the four remedies at issue in *Milliken II*, "*although normally left to the discretion of the elected school board and professional educators*, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a non-discriminatory manner in a school system free from pervasive *de jure* racial segregation." *Id.* at 282 (emphasis added). *See also id.* at 291 ("principles of federalism [are not] abrogated by the decree").

More recently, in *Missouri* v. *Jenkins*, ____ U.S. ____, 110 S. Ct. 1651 (1990), this Court was able to affirm the power of federal courts to require a school district to levy taxes for the funding of a school desegregation plan, while also reaffirming the principle that "local authorities have the 'primary responsibility for elucidating, assessing, and solving'

the problems of desegregation." *Id.*, 110 S. Ct. at 1664 (*quoting Brown II*, 349 U.S. at 299).

Given that the remedial scope of school desegregation decrees has already been defined to account for the value in our constitutional scheme of local control over public education, an interest in such local control cannot now appropriately be a basis for deviating from basic equitable principles governing when those decrees can be dissolved or modified. Such a deviation would undermine—and effectively *re*define—the objectives of desegregation decrees by allowing dissolution before those objectives, defined with full regard for local autonomy, have been fulfilled. The appropriate inquiry upon a motion for dissolution is to determine whether the objectives to which the desegregation decree is directed have, indeed, been achieved.

D. The Burden Is On The School Board To Establish That The School System Has Become "Unitary" In The Sense Required By The Fourteenth Amendment, Thereby Justifying Dissolution Of The Injunction.

The party subject to an equitable decree always bears the burden of establishing that it should be relieved of the obligation to comply with the decree. *See, e.g., Swift*, 286 U.S. at 119; *Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 969-70 (2d Cir. 1983); *Humble Oil & Refining Co.* v. *American Oil Co.*, 405 F.2d 803, 813 (8th Cir.) (Blackmun, J.), *cert. denied*, 395 U.S. 905 (1969).

There is no basis for shifting the burden away from the enjoined party on a motion to dissolve or modify a school desegregation decree. Indeed, in the school desegregation context, the burden is always on the school board to justify actions that appear inconsistent with the affirmative duty to desegregate "to the fullest extent possible" until a "unitary" school system has been achieved.

The affirmative duties of the school board under *Brown* thus place "a heavy burden upon the board to explain its preference for" steps that are "apparently less effective" in

achieving desegregation than other "more promising courses of action." *Green*, 391 U.S. at 439. This burden does not end, and is in fact appropriately triggered, where a school board seeks to abandon a decree that mandates desegregated schools. The district court must evaluate dissolution of the decree—or particular proposals for modification—"in light of any alternatives which may be shown as feasible and more promising in their effectiveness" towards desegregation. *See Green*, 391 U.S. at 439. As this Court has recognized, "the availability to the board of other more promising courses of action may indicate a lack of good faith." *Id.*[6]

Just as a school board can rebut a *prima facie* case of discriminatory intent "only by showing that its past segregative acts did not create or contribute to the current segregated condition" of the schools, *Keyes*, 413 U.S. at 211, so too a

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6 In a school district with a history of *de jure* segregation, the school board's evidentiary burden is defined by the constitutional imperative that "[t]he measure of any desegregation plan is its effectiveness." *Davis* v. *Bd. of School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971). Where a school district seeks to implement, or deviate from, a desegregation plan, this Court has therefore "focused upon the effect—not the purpose or motivation—of the school board's action in determining whether it is a permissible method of dismantling a dual system." *Wright* v. *Council of Emporia*, 407 U.S. 451, 462 (1972). As Justice Stewart explained for the Court in response to arguments by school board officials that their purpose in deviating from a court-approved desegregation plan was nondiscriminatory, an "inquiry into the 'dominant' motivation of school authorities *is as irrelevant as it is fruitless*." *Id.*, 407 U.S. at 462 (citations omitted) (emphasis added).

Indeed, as this Court has stressed, even a purportedly "racially neutral" assignment plan "may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation." *Swann*, 413 U.S. at 212. *See also Keyes*, 413 U.S. at 213 ("neighborhood school policy is not to be determinative 'simply because it appears neutral' "). Even if a finding of "intent" were necessary, "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose" and stand as "one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." *Columbus*, 443 U.S. at 464-65. *See also Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 421 (1977) (*Dayton I*) (Stevens, J., concurring).

school board subject to a court desegregation order retains an affirmative duty to demonstrate that its actions do not allow the vestiges of prior discrimination to have continued effect. The school board is obliged "not to take any action that would impede the process of disestablishing the dual system and its effects." *Dayton II*, 443 U.S. at 538. Although "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention[,] . . . a connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist." *Keyes*, 413 U.S. at 211.

The task, then, is to set forth the factors that a district court should consider in determining whether a school board has satisfied its burden of establishing that a desegregation decree should be dissolved.

II

BEFORE DISSOLVING A DESEGREGATION DECREE, A DISTRICT COURT MUST MAKE A FACTUAL INQUIRY WHICH ESTABLISHES THAT THE VESTIGES OF THE DUAL SYSTEM HAVE BEEN ELIMINATED "ROOT AND BRANCH," AND THAT THE SEGREGATIVE EFFECTS OF THE CONSTITUTIONAL VIOLATION WILL NOT REAPPEAR AFTER THE DECREE IS DISSOLVED

As set forth in Point I, *supra*, a school desegregation decree cannot be dissolved until the school board demonstrates the fulfillment of the objectives to which that decree was directed, namely, the elimination of *de jure* segregation and its vestiges "root and branch" so that the continuation of a school system free from discrimination is assured. This case involves an issue that this Court has not yet addressed—what are the factors a district court should apply to determine whether the dissolution of a desegregation decree is justified? By indicating clearly to the district courts the

nature of the inquiry they should undertake in deciding whether to dissolve desegregation decrees, this Court will continue to perform the role that it has played in prior desegregation litigation when it established the standards to be applied by the district courts in determining the existence of a district-wide violation and the appropriate scope of a remedial decree.

A desegregation decree, like other permanent injunctions, cannot be dissolved until the purposes to which it is directed have been achieved. In applying that standard, a district court must direct its inquiry in two directions—*backward*, to determine whether the school authorities have fulfilled their obligation to operate a fully integrated school system that has eliminated the vestiges of the dual system, and *forward*, to determine whether dual schools are likely to emerge if the injunction is dissolved. Only if these conditions are met can the district court conclude that the injunctive remedy has accomplished its purposes and that the injunction can therefore be dissolved. Only then will the school district have completed the transition to a "unitary system."

In determining whether the school authorities have met the burden of demonstrating that the purposes of the injunction have been achieved, the district court should conduct a factual inquiry addressed, at a minimum, to the following issues:

1. *Is the school system operating on a non-racial basis*? Prior decisions of this Court have outlined the scope of this aspect of a district court's inquiry, which extends beyond the question of whether children, under the decree, are assigned to schools in a nondiscriminatory manner. *See, e.g., Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 18; *Keyes*, 413 U.S. at 196; *Spangler*, 427 U.S. at 436; *Milliken II*, 433 U.S. at 283. *See generally* Point I, *supra*, at 12-16. School districts must provide affirmative answers, supported by factual data, to the following questions:

   a. Has the district's pupil assignment plan achieved the objective of racially integrated schools?

b. Has the assignment of pupils to classes, programs, and activities within individual schools been done on a basis that does not perpetuate the effects of the racially segregated school system?

c. Has racial integration of principals, teachers and staff been achieved?

d. Has the district eliminated inequalities among its schools in physical plant, equipment, curriculum and extracurricular activities?

e. Are funds being allocated to schools on a fully nondiscriminatory basis?

f. Have efforts been made to remedy the educational deficiencies that may have resulted from the dual system?

g. Has racial integration been achieved in the administrative structure of the school system?

2. *In the absence of an injunction, is the school system likely to continue to operate on a non-racial basis*? The purpose of this inquiry should be not simply to establish the subjective good faith of the school authorities, but rather to determine whether structural changes have been adopted in the governance and operation of the system to assure that integration will predictably survive the dissolution of the decree. *See*, *e.g.*, *Green*, 391 U.S. at 438 and n.4; *Swann*, 402 U.S. at 16, 21; *Keyes*, 413 U.S. at 196-211; *Milliken II*, 433 U.S. at 290; *Columbus*, 443 U.S. at 459; *Riddick* v. *School Board*, 784 F.2d at 533; *United States* v. *Lawrence County School Dist.*, 799 F.2d 1031, 1044 (5th Cir. 1986), *reh'g denied*, 808 F.2d 1063 (5th Cir. 1987). *See generally* Point I, *supra*, at 16-18. The district court's inquiry should address the following questions:

a. Have electoral or appointive procedures been established to assure that racial minorities have the opportunity for involvement in the governing process of the school district?

b. Have policies been adopted to assure that decisions with regard to school construction and location are designed to achieve maximum racial integration?

c. Have personnel policies been adopted to assure racial integration in the assignment of teachers and the appointment of principals?

d. Are members of minority groups serving in policy-making administrative positions within the school system?

e. If segregated residential housing patterns resulted from the operation of the dual school system, have these patterns remained in place, thereby diminishing the likelihood that an integrated school system will survive the dissolution of the decree?

3. *Is it foreseeable that in the absence of an injunction the school district may take actions, particularly with regard to pupil assignment, that would have a segregative effect*? The district court should determine whether such actions are foreseeable and, if so, the school district will have a heavy burden of proving that those actions would be taken for compelling and non-segregative purposes, and that such purposes could not be accomplished in a manner that would have no, or less, segregative effects. *See*, *e.g.*, *Green*, 391 U.S. at 430; *Swann*, 402 U.S. at 26; *Wright*, 407 U.S. at 462; *Keyes*, 413 U.S. at 211; *Dayton II*, 443 U.S. at 538. *See generally* Point I, *supra*, at 20-22. Thus, where a change in the pupil assignment system is foreseeable, the decree should not be dissolved unless the district court is satisfied that:

a. The changes will not have the predictable effect of creating schools that are identifiably single-race schools.

b. The changes in the pupil assignment plan are not based on residential housing patterns that are themselves the outgrowth of the prior dual system.

c. The school district has selected the least segregative means of adapting its pupil assignment system to changed circumstances.

d. Changes in the pupil assignment system will not impede the efforts of the school district to maintain a racially integrated school system.

In applying these standards, the district courts should, of course, be sensitive to the concerns that have been present in this Court's prior desegregation rulings. These include the history and special circumstances of the district, such as the duration of time during which the district court operated a dual system, the district's history of resistance to change, the duration of the decree, and the public's acceptance of the permanence of a fully integrated school system. *See, e.g., Swann*, 402 U.S. at 20-21; *Keyes*, 413 U.S. at 211; *Milliken II*, 433 U.S. at 287.

Such concerns have also included the desirability of accommodating changed circumstances in the district through narrow modifications of an existing decree, rather than through the process of new desegregation litigation. Premature dissolution of a desegregation decree inevitably involves citizens, government officials and the courts in litigation far more extensive and complex than is involved in the consideration of more narrowly-defined modifications of existing decrees.

As always, the burden remains on the school district to demonstrate that the goals of the order have been achieved and that the injunction is no longer necessary to preserve those goals. The district courts should dissolve injunctions only where school districts have made such a showing.

III

BECAUSE THE DISTRICT COURT APPLIED AN ERRONEOUS CONSTITUTIONAL STANDARD IN DECLARING THE SCHOOL DISTRICT "UNITARY" AND DISSOLVING THE DESEGREGATION DECREE, ITS DECISION WAS PROPERLY REVERSED AND THE JUDGMENT OF THE TENTH CIRCUIT SHOULD BE AFFIRMED

A. The District Court Never Properly Determined That The Desegregation Decree Could Be Dissolved.

The type of inquiry necessary to justify dissolution of a desegregation decree was never conducted by the district court in this case.

No such inquiry was made in 1977, when, after implementing the desegregation decree for less than six full years, the Oklahoma City school board asked the district court to terminate its jurisdiction. Although Oklahoma City schools had been segregated by law for well over half a century, and although the school board had been recalcitrant just six years earlier in refusing to adopt on its own an effective desegregation plan, the school board in 1977 claimed that it had already "eliminated all vestiges of state-imposed racial discrimination in its school system" and that it was "operating a unitary school system." *See Dowell* v. *Board of Education*, 606 F. Supp. 1548, 1551 (W.D. Okla. 1985).

In response to the school board's motion, the district court held a hearing concerning "the state of desegregation in the Oklahoma City public schools." *Id.* The district court found that the school board had implemented the desegregation decree since 1972, and did not "foresee that the termination of its jurisdiction [would] result in the dismantlement of the Plan" the decree had mandated. *Id.* Based on these findings, the district court terminated its jurisdiction and dissolved a "biracial committee" that had been established to assist the court in actively ensuring compliance with the decree.

The district court, however, did not directly address whether the decree itself could or would be dissolved. Nor were the district court's findings directed to that issue: as the

Tenth Circuit later observed, the district court did not consider, for example, whether there existed any assurance that unitary schools would be *maintained* in the absence of the court's injunction. *See Dowell* v. *Board of Education*, 795 F.2d 1516, 1520 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). The district court's reference in its 1977 order to a "unitary system" in Oklahoma City described little more than compliance by the school board for a period of time with the terms of the desegregation decree. Such compliance was simply insufficient to justify dissolution of the desegregation decree—even where the school board had become "sensitized to the constitutional implications of its conduct" and had "a new awareness of its responsibility to citizens of all races." *See Dowell*, 606 F. Supp. at 1551. The district court's reference certainly did not purport to constitute a finding that the "unitary system" was one "in which racial discrimination [had been] eliminated root and branch," *Green* at 438, nor was there a record before the court that could have supported such a finding.

The district court again did not require the school board to make a sufficient showing when it formally dissolved the desegregation decree in 1987. Even on remand from the Circuit Court, and while seeking to determine whether the dangers prevented by the injunction had "become attenuated to a shadow," *see Dowell*, 677 F. Supp. 1503, 1520 (W.D. Okla. 1987), the district court did not require a showing that racial discrimination and its vestiges had been sufficiently eradicated to assure a unitary system in Oklahoma City in the absence of injunctive relief—the very purpose articulated by the court when it imposed the desegregation decree in 1972. *See Dowell*, 338 F. Supp. at 1272 (recognizing a "continuing duty . . . to retain jurisdiction over the case until it is clear that the constitutional requirements have been achieved.").

More specifically, the district court in 1987 did not sufficiently examine the appropriateness of dissolving its decree when it would result in a return to essentially the same neighborhood elementary school plan that had been rejected in 1972 because it perpetuated the dual school system that the injunction, then entered by the court, was intended to elimi-

nate. The school district was not even required to prove that its purported educational reasons for wanting to return to the segregative neighborhood school plan could not be accomplished in any other way that would not have such segregative effects. The district court approved reversion to the neighborhood school plan, even though it would result in segregated schools, because the *defendant* school board claimed that it would serve purposes that the board deemed important. And the court gave short shrift to the issue that is central: the *plaintiffs*' resulting loss of the relief to which they are entitled—a unitary school system in which racial discrimination has been eliminated root and branch.

B. The Tenth Circuit Properly Reversed The Dissolution Of The Desegregation Decree By The District Court, And The Jurisdiction Of The District Court In This Case Should Be Retained.

Because the district court did not require the school board to satisfy its heavy burden of establishing that the constitutional imperatives of the desegregation decree had been fulfilled—thereby assuring a unitary school district even in the absence of a decree—the judgment of the Tenth Circuit, invalidating the dissolution of the decree, must be affirmed.

The district court's use of the term "unitary" in 1977, though never appealed by the parties, is not a talisman allowing a different result: the term "unitary," absent the necessary underlying factual findings, can have no legal significance justifying dissolution of a desegregation decree. If "[s]ubstance, not semantics, must govern" in school desegregation cases, *Swann*, 402 U.S. at 31, then only when the constitutional imperatives of the Fourteenth Amendment have been fulfilled can the Oklahoma City school system be deemed "unitary" in the constitutional sense. While dissolution of the Oklahoma City injunction will be appropriate at some time, that time will not have arrived until the school board has made an appropriate showing. For now, the district court must retain jurisdiction to take such action as may be appropriate in accordance with the constitutional stan-

dards set forth in this proceeding and the prior decisions of this Court.

The constitutional principles articulated by this Court in *Brown* and its progeny should not now be undermined by premature dissolution of the very desegregation decrees that have been necessary to carry out the mandates of the Fourteenth Amendment.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals should be affirmed.

July 25, 1990

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL COUNCIL OF LA RAZA, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, THE UNITARIAN UNIVERSALIST ASSOCIATION AND THE YWCA OF THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a school district with a history of de jure segregation may unilaterally abandon a court-ordered desegregation plan for elementary school students while residential segregation caused in part by past unlawful state action ensures that inner-city neighborhood schools would be virtually all-black.

STATEMENT OF INTEREST

The American Jewish Committee, founded in 1906, seeks to protect the security and constitutional rights of Jews in America through the preservation of the rights of all Americans. We have been concerned with the inequities of segregated schooling since the late 1940's, when we sponsored research on the effects of de jure segregation. This research was later cited by the U.S. Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954). AJC was *amicus curiae* in both *Brown* and *Keyes v. School District No. 1*, 413 U.S. 189 (1973), and we view the instant case as critical to the preservation of the principles established in those cases.

The Asian American Legal Defense and Education Fund is a national civil rights organization that addresses the critical problems facing Asian Americans. Our civil rights priorities include anti-Asian Violence, Immigrant Rights, Voting Rights, Labor and Employment Rights, and Redress for Japanese Americans incarcerated in camps during World War II. The Oklahoma City school system has yet to uproot the vestiges of de jure segregation and achieve a unitary school system. Continuing desegregation efforts in education must be maintained to achieve equal opportunity in education for minority Americans who, like African

Americans, were compelled to attend segregated schools. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

The National Council of La Raza is a non-profit, tax-exempt corporation dedicated to improving life opportunities for the more than 20 million Hispanics in the United States. NCLR represents over 120 affiliates, which are community-based organizations serving the Hispanic community in 32 states and the District of Columbia. As a long time advocate of Hispanics' rights to equal educational opportunities, we oppose the weakening of the hard-won remedial procedures currently in place which work to resolve long-standing educational discrimination.

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) is a national civil rights organization representing Puerto Rican and other Latinos. PRLDEF is and has been counsel to the Latino community in a number of school desegregation cases in the Northeast. The issue presented in this case is vital to the continued success of several ongoing desegregation efforts and the provision of quality education.

The Unitarian Universalist Association is a religious organization consisting of over 1000 member churches and 100,000 members located throughout the country. It intervenes in cases where racial justice concerns and principles are importantly at issue.

The YWCA of the U.S.A. is a national membership organization whose mission is the elimination of racism and the empowerment of women. As adopted by its national convention, the YWCA supports "measures to assure the full compliance and vigorous enforcement of laws requiring desegregation of the public schools."

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In the Supreme Court of the United States

October Term, 1990
No. 89-1080

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL COUNCIL OF LA RAZA, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, THE UNITARIAN UNIVERSALIST ASSOCIATION AND THE YWCA OF THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF THE CASE

Amici adopt the factual presentation set forth in the Respondents' Statement of the Case.

This brief is submitted with the consent of the parties.

SUMMARY OF ARGUMENT

Any discussion of when a formerly segregated school district is to be declared "unitary" must begin with this Court's long-standing requirement that dual school systems be eliminated "root and branch," which entails the elimination of "all vestiges" of past de jure segregation. Courts must be hesitant to abandon supervision of school districts because of the extreme difficulty that future plaintiffs will have in proving that future school segregation results from the school board "deliberately attempt[ing] . . . to affect the racial composition of the schools." *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 32 (1971). A school district can, therefore, only achieve unitary status if the school board demonstrates by clear and convincing evidence that it has faithfully complied with the desegregation order, that it has taken no recent actions with segregative intent, and that all significant vestiges of past segregation have been eliminated.

In this case, inner-city neighborhood schools which are more than 90% black are the result of a continuing pattern of residential segregation. The segregated character of Oklahoma City schools thus is a significant vestige of the previous governmental policy of racial separation and precludes a finding of unitary status. The trial court's use of the term "unitary" in its 1977 ruling did not indicate a finding of unitary status, but rather that continuing compliance with the desegregation order was successfully causing the district to operate in a non-discriminatory manner.

This Court has consistently held that school desegregation cases are governed by traditional equitable principles. Under these principles, an injunction cannot be dissolved against the will of the prevailing party unless it has fully accomplished its purpose and no

significant risk remains that the injury that required the injunction will recur. Moreover, these standards serve the same concerns of fairness and judicial efficiency that have led this Court to announce a policy of "rigorous application of *res judicata*." The state of residential segregation in Oklahoma City and the drastic resegregation of schools under the neighborhood attendance plan indicate both that the plaintiffs have thus far achieved only partial relief, and that the risk of reversion to separate and unequal schools is still present.

Extensive study of desegregation has produced a stable consensus among social scientists: desegregation has important long- and short-term benefits to minority students and to our society as a whole, without harm to the education of white students. Despite the efforts of opponents of complete desegregation to show that desegregation is either impracticable, ineffective or counter-productive, social scientists now recognize its important long-term remedial effects. Desegregation measurably improves racial tolerance in all parts of our society; it allows minority students to break the cycle of segregation that otherwise limits them to isolated, second-class lives; and it speeds the process of residential integration. Over the short term, desegregation achieves its immediate aim of improving the education of minority students, provided it begins by first grade — as it did in Oklahoma City before petitioner unilaterally abandoned the desegregation plan.

ARGUMENT

I THE OKLAHOMA CITY SCHOOL SYSTEM HAS NOT ACHIEVED UNITARY STATUS

A. *Green* And Its Progeny Require That A Formerly Segregated School District Completely Remedy Its Past Constitutional Violation.

The U.S. Supreme Court has consistently insisted that half-way remedies for de jure segregation are not acceptable. Segregationists' hopes that school districts could constitutionally tolerate the vestiges of segregation ended with *Green v. County School Bd.*, 391 U.S. 430 (1968), which declared that school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination has been eliminated root and branch." *Id.* at 437-38.

Subsequent decisions of this Court have reaffirmed that standard. Thus, *Davis v. Bd. of School Comm'rs of Mobile County*, 402 U.S. 33 (1971), demanded that "school authorities . . . make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Id.* at 37. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), explicitly referred to the elimination of "*all vestiges* of state-imposed segregation," *id.* at 290, quoting *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (emphasis added), while *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), cited *Swann* and *Green* for the proposition that remedial efforts are necessary "until it is clear that state-imposed segregation has been *completely* removed." *Id.* at 459, quoting *Swann*, 402 U.S. at 13 and *Green*, 391 U.S. at 439 (emphasis added).

The reference to the "practicalities of the situation" in *Davis* in no way dilutes this standard. Rather, the Court recognized that, because an injunction must serve a remedial purpose, district courts need not seek total desegregation where local geographic or demographic conditions doom that attempt to failure. *See Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir. 1987) (exempting part of Boston from a desegregation plan due to its geographical isolation); *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974) (finding that the large minority population of Detroit precluded a Detroit-only remedy).

B. The Difficulty Of Proving Anew That Actions With A Segregative Effect Result From A Discriminatory Purpose Requires That School Boards Meet Exacting Standards Prior To The Termination Of Court Supervision.

Before a formerly segregated school system achieves unitary status, there is a rebuttable presumption that actions with segregative results were taken with discriminatory intent. "[T]he Board has a 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (*Dayton II*), quoting *Green*, 391 U.S. at 439. In contrast, after a system becomes unitary, plaintiffs may only win further relief by showing that the school board "deliberately attempted . . . to affect the racial composition of the schools." *Swann*, 402 U.S. at 32. This heavier burden reflects the general rule, set out in *Washington v. Davis*, 426 U.S. 229 (1976), that a state action is not unconstitutional merely because it weighs disproportionately on one group. This Court's adoption of heightened scrutiny of school districts so long as

vestiges of de jure segregation remain is necessary to protect the rights of minority students. It reflects both a justifiable caution that districts with a history of de jure segregation will have a tendency towards future discriminatory actions and a recognition of the difficulty of meeting the discriminatory intent standard.

Given the discriminatory intent standard, a premature finding of unitary status creates an unacceptable risk that minority students will suffer a wrong without a remedy. So long as no evidence of discriminatory intent appears in a public record, minority parents may have no basis to challenge facially neutral school board policies that result in their children attending neighborhood schools that are 99% black and educationally inferior. Already in this case, for example, the Board adopted a facially neutral plan for teacher transfers that caused substantial resegregation of the faculty. *Dowell v. School Bd. of Oklahoma City*, 890 F.2d 1483, 1500 (10th Cir. 1989), *cert. granted*, 108 L.Ed 2d 761 (1990). While a voluntary affirmative action plan ended the resegregation (after this litigation had begun), petitioner could take other "neutral" actions in the future to the disadvantage of minority students. For instance, the Board could resegregate grades 5-12 through a "neighborhood schools" plan or abolish the equity committee that ensures that inner-city schools do not become inferior.

It may be that when black and white students attend the same schools, courts need no longer fear that school districts will treat minority students inequitably, because the Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Missouri*, 58 U.S.L.W. 4916, 4926 (1990) (Scalia, J., concurring). In areas where schools remain highly segregated, however, that requirement provides no protection, because policies which allow minority-dominated schools to deteriorate do not affect the children of the white majority. Given the deplorable state of allegedly

"separate but equal" schools for blacks in the pre-*Brown* era, a fear that significant inequities could again emerge is justified.

The Court has often recognized the difficulty of proving discriminatory intent in multi-member government bodies. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Wright v. City of Emporia*, 407 U.S. 451, 462 (1972). This burden is compounded by several factors present in the case at bar. First, the day has long passed when racism is likely to be explicit in the record, as in *Hunter*, 471 U.S. at 229-31, and *Palmer v. Thompson*, 403 U.S. 217, 250-51 (1971) (White, J., dissenting). "[I]n an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find." *U.S. v. Bd. of School Comm'rs*, 573 F.2d 400, 412 (7th Cir. 1978), *cert. denied*, 439 U.S. 824. This is especially true for school boards previously under court supervision, which are keenly aware that their public records may be scrutinized in a search for invidious intent.

Second, prior school desegregation plaintiffs have been able to base their cases on the existence of a dual school system as of this Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*), because school boards had an "affirmative duty" to remedy the past constitutional violation. *Columbus*, 443 U.S. at 458-59. This rule, critical to desegregation efforts in many cities, no longer applies after a finding of unitary status, which indicates that the board has indeed fulfilled that obligation. Thereafter, efforts to demonstrate illegal segregation become far more difficult than they had been in the past.

Third, this Court has recognized the number and complexity of factors that a school board must consider regarding school construction and student assignments. *Swann*, 402 U.S. at 20. In this context, a school board may often be able to advance plausible, non-invidious

justifications to conceal discriminatory actions.

Finally, in this age of extensive discovery, out-of-town experts and lengthy trials, a suit seeking to prove segregative intent is tremendously costly. Future plaintiffs, particularly in small rural school districts, will have great difficulty obtaining the funds to support an attempt to meet this standard.

Petitioner is wrong when it seeks to reassure this Court that, should the School Board take any future action with an intent to disadvantage the minority community, respondents will easily be able to prove an unconstitutional purpose. Brief of Petitioner at 31-32. As the Court has stated in another context, "[t]he difficulty of ferreting out these evils . . . supplies an additional reason why we should leave the defendants where we find them [with the injunction in place]." *U.S. v. Swift*,, 286 U.S. 106, 119 (1932).[1] Therefore, a school district with a history of discrimination must meet highly rigorous standards before it can be found to have achieved true unitary status and be released from judicial supervision.

C. A School Board Must Show, By Clear And Convincing Evidence, That The Constitutional Violation Has Been Completely Remedied.

In a hearing to determine whether a school district has achieved unitary status, the error costs are not equal. Should the trial court erroneously find that the desegregation plan is still necessary, little harm will result. The court will continue supervision, the present injunction will remain in effect so long as the court is convinced it has not become inequitable, and the board

[1] For this and other reasons discussed below, there is a heavy burden upon a party who seeks dissolution of a permanent injunction. See Point II, p. 14 *infra*.

will be able to demonstrate its achievement of unitary status at some point in the future. A finding of unitary status, on the other hand, terminates the case and puts the plaintiffs back at square one, where they cannot gain any relief absent a fresh showing of discriminatory intent.

This Court has noted that when a court must choose between maintaining the status quo and taking an irreversible step, it is appropriate to require the party seeking a permanent change to prove its case by clear and convincing evidence. *Cruzan*, 58 U.S.L.W. at 4921; *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). By that same reasoning, the "clear and convincing" evidence standard should be applied to a school board seeking a determination that it has achieved unitary status.

Ever since this Court's decision in *Green*, the term "unitary" has expressed the goal of school desegregation plans. While the term has never been precisely defined, prior desegregation cases suggest that a school district seeking to end court supervision must pass each of three distinct tests. First, it must have been in good faith compliance with the desegregation order for a substantial number of years. Since prolonged de jure segregation has been shown to have dramatic long-term effects on the social order of a region, even the most aggressive desegregation plan cannot effect a complete remedy in a brief period of time. The full cooperation of the board is indispensable for a successful transition to unitary status, and "reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Morgan*, 831 F.2d at 321. Several circuits have adopted this requirement. *See Ross v. Houston Independent School Dist.*, 699 F.2d 218, 225 (5th Cir. 1983); *Morgan*, 831 F.2d at 321 (1st Cir.); *Jacksonville Branch, NAACP v. Duval County*, 883 F.2d 945, 952 (11th Cir. 1989).

A second requirement is that the board show that it

has taken no recent action from which segregative intent can be inferred. Thus, if, at the hearing regarding whether the district has achieved unitary status, the plaintiffs show that recent board decisions have had segregative effects, the board should bear the burden of proving an absence of discriminatory purpose. The ability of a school board to make this showing, or the lack of any evidence of resegregation, would be strong corroborating evidence that the board has the good faith required by *Ross*, *Morgan* and *Duval County*. Further, this requirement is necessary for reasons of judicial efficiency, for any resegregation caused by the board may be the basis of future litigation to prove that intentional segregation has recurred. More generally, this standard is consistent with *Dayton II*'s imposition of a "heavy burden" on the school board to justify actions that continue the effects of the dual system. *Dayton II*, 443 U.S. at 538.

Third, the school board must demonstrate that the school board is "clean of every residue of past official discrimination." *Ross*, 699 F.2d at 225. This should not be confused with an unrealistic requirement that the board eliminate every minute vestige of prior discrimination, such as a slightly disproportionate presence of minority groups in some schools. It is clearly impossible to eliminate *every* vestige, and an attempt to do so would lead to the imposition of desegregation efforts long after they have ceased to generate remedial benefits. However, the continued presence of significant vestiges of segregation is plainly at odds with this Court's requirement that school boards eliminate "*all* vestiges of state-imposed segregation." *Milliken II*, 433 U.S. at 290 (emphasis added).

These standards are quite similar to those advocated by petitioner, *amicus* United States, and neutral *amici* Council of the Great City Schools et al. Brief of Petitioner at 16-18; Brief of the United States at 23-25; Brief of the Council of the Great City Schools et al. at 13-14. Our quarrel is not with the standards espoused by those parties, but rather with the lax application that petitioner and the United States suggest.

D. A District Is Not Unitary So Long As Residential Segregation Due To Past Discriminatory State Action Causes Neighborhood Schools To Be Predominantly Of One Race.

No one has disputed the trial judge's early finding that, prior to the intervention of the district court, "the [segregated] residential pattern . . . in the Oklahoma City school district ha[d] been set by law for a period in excess of fifty years." *Dowell v. School Bd. of Oklahoma City*, 219 F. Supp. 427, 433 (W.D. Okla. 1963). This Court has long recognized the influence that de jure school segregation, and school board policy in general, can have on residential patterns, and vice versa. *Swann*, 402 U.S. at 20-21; *Keyes v. School District No. 1*, 413 U.S. 189, 211-12 (1973). Many sociological studies have confirmed this view. *See, e.g.*, D. Pearce et al., *The Effect of School Desegregation on the Rate of Residential Desegregation in Large Cities* (Presented at the Annual Meeting of The American Sociological Association, San Antonio 1984);[2] Appendix, *Social Segregation and Residential Segregation: A Social Science Statement*, Brief of Respondents in *Columbus Bd. of Educ. v. Penick*, at 6a-9a (hereinafter cited as "*Columbus* Appendix").[3]

Modern research has established that residential segregation persists long after the contributory segregative state action has ended. *See Columbus* Appendix at

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[2] Since this document is not yet publicly available, a revised draft has been lodged with the Clerk for the convenience of the Court.

[3] The *Columbus* Appendix, signed by 38 social scientists from 27 separate institutions, summarizes the state of social science knowledge regarding school and residential segregation as of 1979.

5a, 16a-17a; Pearce et al. at 1. Petitioner's own expert witness, Dr. William Clark, acknowledged this fact, admitting that, once an area is predominantly Afro-American, it will remain such for many years because white families are strongly disinclined to move in. TR at 105-07.[4] Further, this Court recognized the long term viability of residential segregation in *Dayton II*, where it stated that, although a facially neutral neighborhood school policy was in effect, "[g]iven intentionally segregated schools in 1954, . . . the Court of Appeals was quite right in holding . . . that the system-wide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts." *Dayton II*, 443 U.S. at 537.

The Fifth Circuit has repeatedly cautioned against hasty findings of unitary status while residential segregation continues to cause neighborhood schools to be almost exclusively minority. Even where an original desegregation order was entered in 1969, the Fifth Circuit found, seventeen years later, that residential segregation remained "a vestige of past segregative practices by the Board." *U.S. v. Lawrence County School Dist.*, 799 F.2d 1031, 1043-44 (5th Cir. 1986). Therefore, the Fifth Circuit has held, the existence of "virtually one-race schools . . . is inconsistent with the achievement of unitary status," *Lee v. Tuscaloosa City School Sys.*, 576 F.2d 39, 41 (5th Cir. 1978), and that a district seeking unitary status "must demonstrate . . . that 'current segregation is in no way the result of [its] past segregative actions.' " *Ross*, 689 F.2d at 225, quoting *Keyes*, 413 U.S. at 211 n.17; *Lawrence County*, 799 F.2d at 1044.[5]

Given the uncontested fact that in this case severe

[4] References to the Trial Record are abbreviated as TR.

[5] *U.S. v. Overton*, 834 F.2d 1171 (5th Cir. 1987), is not to the contrary, as that panel of the Fifth Circuit gave preclusive effect to a past, unappealed dismissal of the case. The panel did not, therefore, review the basis for the finding of unitary status.

residential segregation persists in the same area in which it was created, petitioner could not and did not make this essential showing. The Tenth Circuit properly set aside the district court's finding to the contrary as clearly erroneous.

E. A School System That Is Temporarily Operating In A Unitary Fashion Has Not Necessarily Achieved Unitary Status.

Some judges have used the term "unitary" to describe a school district which, due to the implementation of a mandatory desegregation, is operating in a non-discriminatory fashion. A finding to that effect indicates that the continuing presence of the injunction acts as a complete remedy. At this point, the court is justified in terminating its active supervision of the case, and the plaintiffs may not contest the remedy as inadequate.

A school district which is operating in a unitary fashion through continued enforcement of a court order is quite different, however, from a district which would operate in a non-discriminatory fashion even if *all* desegregation efforts were immediately halted. The Eleventh Circuit has distinguished these two situations:

> Some confusion has been generated by the failure to adequately distinguish the definition of a "unitary" school system from that of a school district which has achieved "unitary status." . . . [A] unitary school system is one which has not operated segregated schools as proscribed by cases such as *Swann* and *Green* for a period of several years. A school system which has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through proper judicial procedures.

Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985).

The terms of the 1977 decree terminating jurisdiction over this case indicate that the district court did not find that the Oklahoma City school system had achieved unitary status. Rather, the finding was merely that, fourteen years after the court found that the Board was operating a dual system, the system was finally operating in a unitary fashion, so the court could end its active supervision. The decree did not dissolve the injunction, and explicitly stated the district court's understanding that "termination of its jurisdiction will [not] result in the dismantlement of the plan." *Dowell v. School Bd. of Oklahoma City*, No. CIV-9452, slip op. at 1 (W.D. Okla. 1977), quoted in *Dowell v. School Bd. of Oklahoma City*, 795 F.2d 1516, 1519 (10th Cir. 1986), *cert. denied*, 479 U.S. 938.[6]

II PETITIONER HAS NOT DEMONSTRATED THAT THE INJUNCTION HAS FULFILLED ITS PURPOSE SUFFICIENTLY TO ALLOW ITS DISSOLUTION

A. Petitioner Is Required To Show At Minimum That It Has Eliminated The Harm That Led To The Injunction, And That There Is No Significant Risk That This Harm Will Recur.

[6] Since this issue is important only to the parties in this case, resolution of whether or not that decree indicated a finding of what this Court understands to be unitary status, and its preclusive effect, if any, may best be left to the Tenth Circuit on remand, after this Court has supplied that circuit with a precise definition of unitary status. This suggestion is echoed by *amicus* United States. Brief of the United States at 21-22.

Since *Brown v. Bd. of Educ.*, 349 U.S. 298 (1955) (*Brown II*), this Court has consistently held that desegregation orders, like all injunctions, are governed by traditional equitable principles. *Brown II*, 349 U.S. at 300. Thus, in considering the standard for dissolution of these injunctions without the consent of the prevailing party, *Brown II* indicates that the starting point is this Court's prior decision in *Swift*. Although *Swift* concerned the continued effect of an antitrust injunction, not a school desegregation plan, there are several principles emanating from *Swift* that are generally applicable.

First, *Swift* makes clear that equitable decrees, like all other results of litigation, are entitled to strong *res judicata* effect. At a minimum, "*Swift* holds that [an injunction] may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *U.S. v. United Shoe Machinery*, 391 U.S. 244, 248 (1968) (emphasis in original). The defendants may not attack the injunction collaterally after it becomes final. "The injunction, whether right or wrong, is not subject to impeachment in its application to conditions that existed at its making." *Swift*, 286 U.S. at 119.

Second, *Swift* was explicitly concerned with the risk that the circumstances that required the injunction would recur if it were dissolved. "The inquiry for us is whether the changes [in circumstances] are so important that dangers, once substantial, have become attenuated to a shadow." *Id.* While the requirement that the danger of recurrence be "attenuated to a shadow" may seem an unduly harsh standard to impose on a public body, a court certainly is not justified in dissolving an injunction if a significant risk remains that inner-city schools will revert to their former separate and unequal status.

To be sure, *Swift* recognizes that unforeseen circumstances can make the most carefully considered

injunction inequitable. Should this occur, the proper recourse for the court is to modify the injunction so it may better accomplish its purpose, not to dissolve it prematurely, unless that is the only way to remedy the inequity. Since some aspects of the present injunction may have become inequitable, the Tenth Circuit properly remanded the case to the trial court to consider if modification is appropriate. *Dowell*, 890 F.2d at 1505-06.

In sum, *Swift* teaches that a court is justified in dissolving an injunction only if the injunction has fully accomplished its purpose and no significant risk remains that the injuries that led to its imposition will recur. No such showings have been made by petitioner.

B. Public Policy Requires That Courts Not Dissolve An Injunction Without The Consent Of The Prevailing Party Unless The Injunction Has Fully Accomplished Its Purpose.

The doctrine of *res judicata* promotes fairness by ensuring that parties who have had a full opportunity to litigate an issue are bound by the result, *Federated Department Stores v. Motie*, 452 U.S. 394, 401 (1981), and conserves judicial resources by decreeing an end to litigation. *Blonder-Tongue Laboratories v. University Foundation*, 402 U.S. 313, 324-25 (1971), quoting *Bruszewski v. U.S.*, 181 F.2d 419, 421 (3rd Cir. 1950); *Federated Department Stores*, 452 U.S. at 401-02. Consequently, this Court has adopted a policy of "rigorous application of *res judicata*." *Id.* at 400.

The concern about fairness is particularly strong in this case, as the defendants are essentially demanding the right to re-litigate the extent of the injunction. This Court has frequently stated its unqualified opposition to allowing parties to re-litigate, even in cases where the original judgment was wrong. *Id.* at 398-99. If petitioner

felt that the terms of the 1972 injunction would cause it to last too long, it should have sought a time limitation on direct appeal. There is no evidence that petitioner did so, and the Tenth Circuit's opinion on the appeal from the 1972 order, *Dowell v. School Bd. of Oklahoma City*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041, does not discuss the issue. Having failed to raise this issue on direct appeal, petitioner is therefore barred from asserting it now. *Reed v. Allen*, 286 U.S. 191, 198-99 (1932); *Federated Department Stores*, 452 U.S. at 400.[7]

The adoption of permissive standards for the dissolution of an injunction would create an unnecessary burden on judicial resources. If a civil rights injunction is subject to dissolution once its purposes have been "substantially" achieved, enjoined parties could repeatedly return to court to argue that they are now "close enough." Similarly, if this Court allows dissolution despite significant risks of a recurrence of the injuries that created the need for an injunction, the groundwork would be laid for future litigation over whether a constitutional violation has recurred.

Maintaining rigorous standards for the dissolution of an injunction, by contrast, provides the certainty that parties need to order their affairs without repeated resort to the courts to clarify their rights and obligations. Courts would only be involved on the rare occasion that circumstances have changed to such a degree that the injunction has become inequitable, or when the injunction has been so successful that it may be dissolved. In this case, for instance, the desegregation plan was in place for eight years without the parties going to court once.

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[7] *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976), is not to the contrary. There, the intervening decision by this Court in *Swann* was found to have created a sufficient change in the legal climate to justify a modification of the injunction even though it was not appealed. *Spangler*, 427 U.S. at 437-38. No such change in the law or facts has occurred in this case.

C. The Present State Of Segregation In Housing And Education In Oklahoma City Indicates That The Foregoing Standards Have Not Been Met.

In this case, petitioner has shown neither complete achievement of the purposes of the injunction nor the absence of a significant risk of a recurrence of separate and unequal schools. In Oklahoma City, children in the area once served by all-black schools now attend schools more than 96% black, while 13 formerly all-white schools are once again more than 80% white. Compare *Dowell*, 338 F. Supp. 1256 at 1260 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041, with *Dowell v. School Bd. of Oklahoma City*, 677 F. Supp.1503, 1509-10 (W.D. Okla. 1987), *rev'd*, 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 108 L.Ed 2d 761 (1990). Under the present "neighborhood schools" policy, 40% of the Afro-American students in grades 1-4 in Oklahoma City are attending schools that are 90% black. Plaintiff's exhibits 26, 27. Thus, dissolution of the injunction would mean that, after proving that the defendants engaged in pervasive constitutional violations with major detrimental impact on the Afro-American community in Oklahoma City, the plaintiffs did not achieve the elimination of the vestiges of that illegal action. Rather, they accomplished only a suspension of its effects for twelve years. This kind of hollow victory would discourage the victims of discrimination from seeking to vindicate their rights.

Afro-American students are once again in 90% black classes in the same buildings where the white majority isolated their parents with inferior educational opportunities. Given the insulation of the children of the white majority from deterioration of the virtually all-black schools, the difficulty of proving discriminatory intent, and the sad history in this country of district after district neglecting the education of minority youth, there is a clear risk of reversion to separate and unequal

schools. Equitable injunctions cannot be dissolved in the presence of such a risk. "Whether the defendants would resume that practice . . . we do not know. . . . [Their position] carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *Swift*, 286 U.S. at 116.

III AGGRESSIVE DESEGREGATION EFFORTS ARE REQUIRED IF INNER CITY MINORITY CHILDREN ARE TO HAVE ACCESS TO EQUAL EDUCATIONAL OPPORTUNITIES

A. Modern Research Has Shown That, Over The Long Term, School Desegregation Helps To Break The Cycle Of Racial Isolation In The Lives Of Minority Students And In Our Society As A Whole.

Ever since school desegregation was first mandated in *Brown I*, few areas of constitutional law have provoked as much controversy and resistance. This Court has been forced to strike down various techniques developed by state authorities to undermine the goals of desegregation. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958) (state denial of this Court's authority); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964) ("privatization" of public schools); *Green* ("freedom of choice" plan that perpetuated 100% segregation); *Wright* (subdivision of school district to isolate predominantly white area from a desegregation plan); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (state anti-busing law). For a partial list of similar cases in the lower courts, see *Green*, 391 U.S. at 423 n.1.

After *Swann* and its companion cases established that desegregation was constitutionally required to the maximum extent practicable, opponents of desegrega-

tion have continually sought to show that desegregation is impracticable and serves no remedial purpose.[8] This argument is premised on the notion that a neighborhood school policy is better for minority students than a desegregation plan, even in cities with pronounced residential segregation.

But, starting with *Brown I*, this Court rejected the argument that separate can be equal. The *Brown I* court recognized that for minority students, "[separation] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494. This statement applies with only slightly less force to cities where an official policy of segregation is no longer present. *Keyes*, 413 U.S. at 229-30 (Powell, J., concurring in part and dissenting in part).

To support its conclusion, the *Brown* Court cited a series of preliminary studies that demonstrated that segregated education offers black students inferior opportunities. *Brown I*, 347 U.S. at 494 n.11.[9] The great weight of modern research reaffirms this view. This result does not in any way stem from a belief that minority children cannot learn without sitting next to white children. Rather, the dominant factors are the presence of children of a higher socioeconomic status, U.S. Office of Education, *Equality of Educational Opportunity* at 22 (1966),[10] as well as the tendency of children of both races

[8] For a discussion of early efforts to discredit desegregation, see W. Hawley, *The New Mythology of School Desegregation*, 42 Law & Contemp. Probs., Autumn 1978, at 214. In this case, the argument is made in the Brief of Landmark Legal Foundation as *Amicus Curiae* in Support of Petitioner. However, the studies cited by that brief do not support Landmark's view that desegregation plans like the one abandoned by petitioner serve no educational purpose. See note 16 *infra*.

[9] Some of the research cited by the Court was originally sponsored by *amicus* American Jewish Committee.

[10] This study, written by Dr. James Coleman at the request of Congress, is commonly known as the *Coleman Report*.

who learn in an integrated environment to stop perpetuating the patterns of racial segregation and prejudice so prevalent in all aspects of our society. J. Braddock et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 Phi Delta Kappan 259, 262 (1984).[11]

Most importantly, school desegregation helps to break the cycle of segregation that continues to permeate our society. Minority students who live in highly segregated communities and attend schools that are almost exclusively minority have little contact with other elements of the society during their youth. They therefore lack both the confidence that they can succeed in integrated situations and the understanding of the majority culture that results from an integrated education. Braddock et al. at 262; J. Braddock and J. McPartland, *Socio-Pyschological Processes That Perpetuate Racial Segregation*, 19 J. of Black Studies 267, 285-86 (1989) (hereinafter cited as "Braddock and McPartland I"). Consequently, they are far more likely than desegregated students to attend a segregated college (if they attend one at all), to live in a segregated neighborhood, and to have few white friends and co-workers. Braddock et al. at 260-62. *See also Columbus* Appendix at 12a-13a; U.S. Civil Rights Commission, *Racial Isolation in the Public Schools* at 114 (1967). A recent study of graduates in a unique controlled experiment in Hartford, Connecticut confirmed these findings. R. Crain et al., *Finding Niches: Desegregated Students Sixteen Years Later* (draft final report 1989), at 28, 78.[12]

Desegregation improves minority employment opportunities. Since most employers rely heavily on informal social networks to fill jobs, J. Braddock and J.

[11] This article is a summary of 10 studies involving the work of eight social scientists.

[12] Since this document is not yet publicly available, a copy has been lodged with the Clerk for the convenience of the Court.

McPartland, *How Minorities Continue to Be Excluded From Equal Employment Opportunity: Research on Labor Market and Institutional Barriers*, 43 J. of Social Issues 5, 7 (1987), minority citizens are significantly less likely to be considered for jobs by white employers if, due to a segregated education, they are isolated from social contact with whites. *Id.* at 9. Studies have also shown that white employers are more likely to hire a minority applicant from a desegregated high school than one from a segregated, inner-city high school. *Id.* at 19. Since most predominantly minority jobs have less prestige and pay lower salaries than other jobs, segregated schooling therefore perpetuates the economic inferiority of minority citizens. Braddock and McPartland I at 278.

Desegregation also has important effects on white citizens. Despite occasional racial conflicts, studies have shown that, overall, the contacts they and their children have with minority groups in schools lead to greater racial tolerance and understanding among whites, Braddock et al. at 262, and make them more likely to live in integrated neighborhoods and have black friends. *Columbus* Appendix at 12a-13a. Desegregation has no adverse effect on white academic achievement. *Id.* at 21a; Committee on the Status of Black Americans, *A Common Destiny: Blacks and American Society* at 374 (1989).

Further, just as segregative school policies can lead to residential segregation, school desegregation produces the opposite effect, encouraging integrated neighborhoods. *Columbus* Appendix at 9a; Pearce et al. at 19. When a desegregation plan prevents any schools from being identified as a "white" school or a "black" school, white parents cannot move to a segregated neighborhood in order to send their children to a predominantly white school. *Id.* at 2-3. Further, school desegregation allows minority families more mobility, because it ensures that theirs will not be the first non-white faces seen in a neighborhood. *Id.* at 2

Recent studies have confirmed that the integrative effect of desegregation is dramatic. A survey of 25 cities found that the extent of residential desegregation was closely related to the extent of school desegregation. *Id.* at 19. Overall, the rate of residential desegregation was *nine times* greater in cities with school desegregation plans than in cities without them. *Id.*

Unfortunately, absent continued school desegregation efforts, these findings cast strong doubt on the long-term viability of the integrated neighborhoods in Oklahoma City that arose while the Finger plan was in effect. If the elementary schools of Oklahoma City continue to be run on a neighborhood basis, the trend towards residential integration will slow and may well reverse itself as parents once again are able to control the racial composition of their children's school.[13] This precise effect was noted by the District Judge earlier in this case: "[I]nflexible adherence to the neighborhood school policy . . . serves to maintain and extend school segregation by extending areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools." *Dowell v. School Bd. of Oklahoma City*, 244 F. Supp. 971, 976-77 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *see also Dowell*, 219 F. Supp. at 434. The destabilizing effect of "neighborhood school" plans has been noted in the literature. *Columbus* Appendix at 8a-9a; Pearce et al. at 2-3, 18-19.

B. School Desegregation Improves Minority Student Academic Achievement.

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[13] Although school desegregation for younger students has been halted for five years in Oklahoma City and Norfolk, Va., *Riddick v. School Bd. of City of Norfolk*, 784 F.2d. 521, *cert. denied*, 519 U.S. 938 (1986), the data to test this theory will not be available until the results of the 1990 census are published.

The positive short-term effects of school desegregation have also been amply verified by a series of conclusive studies. An analysis of the results of 73 studies revealed that the academic achievement of minority students who are desegregated by first grade rises substantially. *Columbus* Appendix at 23a-24a.[14] In sharp contrast, however, students who are desegregated in later years show no improvement in achievement. *Id.* As noted above, white student achievement is not affected.

These findings, supported by other data, *see id.* at 24a, are attributable to the segregated social patterns that children quickly develop during years of segregated education.[15] *Id.* at 23a-24a. For the same reasons that graduates of segregated schools have difficulty integrating into society as a whole, students who begin their schooling in segregated environments remain isolated from children of other races when they are later placed in the same classroom. This Court has recognized the cultural barriers that arise when children who are educated in isolation are thrust into an integrated setting. *Milliken II*, 433 U.S. at 287-88. Therefore, Oklahoma City's decision to postpone integration until grade five is not a mere minor delay, but rather a decision that is bound to have major negative repercussions on the overall success of desegregation.[16]

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[14] This study was subsequently published as R. Crain and R. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 Law & Contemp. Probs., Summer 1978, at 17.

[15] These findings were challenged at trial, based on papers appearing in National Institute of Education, *School Desegregation and Black Achievement* (1984). These papers, never published in a refereed journal, TR at 995, 997, analyzed a subset of 19 of the 93 studies and found that desegregation had no effect on academic achievement. However, all but one of the studies in this subset concerned districts in which desegregation occurred after several years of segregated education. TR at 996. Thus, the findings of those studies do not in any way conflict with the results reported in Crain and Mahard. *Id.*

[16] *Amicus* Landmark Legal Foundation seeks to show that desegregation has no educational benefits. Landmark, however, cites

Finally, desegregation has been shown to help

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only two scientific studies to support that claim. Neither of these citations is persuasive.

Landmark cites *School Desegregation and Black Achievement*, note 15 *supra*, for the proposition that "desegregation has small positive effects on black student achievement in reading and no effects on black achievement in math." Landmark Brief at 16. However, as discussed in note 15 *supra*, all but one of the groups of students analyzed in this study were desegregated after years of segregated schooling. Thus, as was pointed out five years earlier in the *Columbus* Appendix, no gains in black student achievement were to be expected. *Columbus* Appendix, at 23a-24a. The results of the cited study therefore do not apply to a desegregation plan that begins in first grade, as the plan in Oklahoma City did until that crucial feature was unilaterally abandoned by petitioner.

Landmark relies on *A Common Destiny* to support two additional assertions. First, it states that "[d]espite nearly three decades of forced busing, 'there remains a persistent and large gap' between black and white [achievement]," Landmark Brief at 15-16, quoting *A Common Destiny* at 378. Second, it claims that studies reported in *A Common Destiny* have shown both that desegregation harms black aspirations and that "blacks in non-integrated schools have higher self-esteem than blacks in integrated schools". Landmark Brief at 16, citing *A Common Destiny* at 373-74. Both citations to this report, prepared by a distinguished panel of 22 experts from 20 different institutions under the auspices of the National Research Council, are taken selectively out of context and in fact are contrary to the explicit conclusions of *A Common Destiny*. While *A Common Destiny* did note the presence of a black/white achievement gap, it found that "over a relatively short period from 1970 to 1980, the gap between average performance of white and black school children narrowed appreciably." *Id.* at 351. School desegregation was identified as a "contributing factor" in this accomplishment. *Id.* at 350.

Regarding the psychological effects of desegregation, *A Common Destiny* concluded that "findings on the self-esteem and educational aspirations of black children in desegregated schools are so diverse that overall generalizations are not warranted." *Id.* at 373. Overall, the authors found that school desegregation "modestly improves black performance (particularly reading)" and that "when several key conditions are met, intergroup attitudes and relations improve after schools are desegregated." *Id.* at 379. It is therefore puzzling why Landmark believes that *A Common Destiny* supports its conclusion that desegregation "detracts from the educational mission." Landmark Brief at 10.

break the recurring tragic pattern of teenage girls becoming pregnant and terminating their education, leaving them as unwed, unprepared and uneducated mothers. Research has shown that desegregated female students tend to delay their first sexual experiences, F. Furstenberg et al., *Race Differences in the Timing of Adolescent Intercourse*, 52 American Sociological Review 511, 515 (1987), and become teenage mothers less often. Crain et al. at 28-29, 77.

Taken as a whole, the research cited herein reveals two critical facts. First, the effects of school segregation on minority students and on the residential complexion of a city are dramatic, and may well provide a partial explanation for some of the discrepancies between white and minority citizens in this country. Second, continuing desegregation efforts have important beneficial effects, and remain an essential part of the remedy for past segregation. Thus, school desegregation has been proven to successfully remedy illegal past de jure segregation while promoting the "central *educational* function of the schools." *Milliken v. Bradley*, 418 U.S. 717, 764 (1974) (*Milliken I)* (White, J., dissenting) (emphasis in original). While local control of school districts remains an important consideration, it must give way to the need to provide a complete remedy for the past constitutional violations in Oklahoma City.

CONCLUSION

For the foregoing reasons, we urge this court to affirm the decision of the Tenth Circuit in its entirety.

Dated: July 23, 1990

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* The substantial contribution to this brief of Mr. Robert Ziff, Cornell Law School class of 1992, is gratefully acknowledged.

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No. 89-1080

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The National Education Association (NEA), with the consent of the parties, submits this brief *amicus curiae* in accordance with the Rules of this Court.[1]

INTEREST OF THE AMICUS CURIAE

NEA is a nationwide employee organization with a current membership of more than two million members, the vast majority of whom are employed by public school districts, colleges and universities.

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[1] Pursuant to Rule 37, copies of the letters of consent from the parties have been filed with the Clerk.

Both to advance the cause of civil rights and to help assure that all students have access to a quality public education, NEA is committed to achieving full and lasting integration of the nation's public schools. As part of this commitment, NEA opposes efforts by school boards, such as the effort by petitioner in this case, to resegregate previously integrated schools.[2]

NEA has filed *amicus curiae* briefs in several prior school desegregation cases in this Court, and regularly has participated in school desegregation cases in the lower federal courts.

STATEMENT

NEA agrees with the statement of the case set forth in the brief of respondents Robert L. Dowell, *et al.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner asserts that this case presents two principal issues, one having to do with whether the standards for vacating injunctions articulated in *United States v. Swift & Co.*[3] and its progeny are applicable to school desegregation cases, and the other having to do with the effect on a desegregation decree of a determination that a school district has attained "unitary" status. But these questions do not accurately reflect the substance of petitioner's quarrel with the position taken by the Court of Appeals.

Although petitioner and its supporting *amici* have extensively briefed both the *Swift* issue and the "unitari-

[2] The NEA Representative Assembly, which is the organization's highest governing body, has adopted a resolution entitled "Integration in the Public Schools." This resolution states, *inter alia*, that NEA "believes that it is imperative that full integration of the nation's schools be effected," and that "[t]he Association opposes any attempts to delay or impede implementation of desegregation orders and will, therefore, resist efforts of school boards to resegregate integrated schools."

[3] 286 U.S. 106 (1932).

ness" issue, they concede that in the final analysis a desegregation decree properly may be terminated *only* if all vestiges of the discrimination that gave rise to the decree have been eliminated. *See infra* at 5-8. But that is the very test that was applied by the Court of Appeals when it stated that a decree may be vacated once "the condition the order sought to alleviate, a constitutional violation, has been eradicated," Pet. App. 14a, such that the decree "is no longer necessary to achieve the court's original objective," Pet. App. 17a. Because petitioner's purported disagreement with the legal standard applied by the Court of Appeals informed the questions on which certiorari was sought and granted, and because subsequent briefing indicates that this disagreement is illusory, the writ should be dismissed as improvidently granted. (Part I).

Petitioner's basic quarrel is with the refusal of the Court of Appeals to accept its contention that all vestiges of Oklahoma City's former *de jure* segregation have been eliminated. Specifically, the question on which this case really turns is whether the District Court's finding that residential segregation in Oklahoma City today is largely the result of "personal preferences," Pet. App. 17b, amounts to a determination that the vestiges of *de jure* segregation have been eliminated, such that there is no longer any basis for a continuing injunction. Because this is not among the questions on which certiorari was sought and granted, and because the District Court's factfinding makes this case a particularly poor vehicle for considering the significance of continued residential segregation in determining whether a school desegregation decree should be terminated, it would be inappropriate for this Court to reach the issue. In the event the Court chooses to do so, however, we discuss the principles that should govern the analysis, and show why, on the basis of those principles, the decision of the Court of Appeals should be affirmed. (Part II).

ARGUMENT

I. THE LEGAL STANDARD ESPOUSED BY PETITIONER—THAT A DESEGREGATION DECREE MAY BE DISSOLVED ONLY IF ALL VESTIGES OF DISCRIMINATION HAVE BEEN REMOVED—IS THE STANDARD THE COURT OF APPEALS IN FACT APPLIED, AND THE QUESTIONS ON WHICH CERTIORARI WAS SOUGHT AND GRANTED ARE THEREFORE NOT PRESENTED HERE.

It is appropriate at the outset to make clear what is and is not before the Court in this case. The question is *not* whether there were circumstances warranting some *modification* of the original desegregation decree: the Court of Appeals was "satisfied the evidence reveals that because of population shifts in the District, it was necessary to modify the Finger Plan," Pet. App. 30a, and respondents themselves proposed certain modifications.[4] Nor does this case pose the question whether the District Court was required to engage in *ongoing active supervision* of the respondent school district. In school desegregation cases, as in others, the powers of a court of equity are "br[oad] and flexib[le]," *Swann v. Board of Education*, 402 U.S. 1, 15 (1971), and the Court of Appeals recognized that there may well come a point—which may in fact have been reached here—where a court should "curtail[] active supervision," Pet. App. 17a, n.17, without, however, vacating all injunctive re-

[4] Thus, although we believe that petitioner's broadscale attack on the compulsory busing of elementary school students is overblown, *see* Pet. Br. at 23-25; *see also* Brief of the Landmark Legal Foundation Center for Civil Rights as Amicus Curiae in Support of Petitioner at 10-20, this case does not present the question whether the District Court could or should have modified the busing requirements of the Finger Plan. The District Court dissolved the injunction in its entirety, and the question presented by the petition is whether the Court of Appeals erred in directing the District Court to consider modification rather than dissolution.

lief, *id.* What is at issue in this case is whether the circumstances were such as to warrant dissolution of the injunctive decree in its entirety.

In arguing that the Court of Appeals erred when it answered this question in the negative, petitioner purported in its Petition for Certiorari to find fault with the Tenth Circuit's reasoning with regard to two matters: (i) the standards that govern equity courts in considering requests for dissolution of a decree (the "*Swift* issue"), and (ii) the consequences of a determination of "unitariness." But now that the briefs are in it is apparent that petitioner does not actually disagree with the Court of Appeals as to the circumstances in which a school district should be found to be "unitary," or (what proves to be the same thing) the circumstances in which a desegregation decree may be dissolved. Rather, petitioner simply disagrees with the Court of Appeals' determination that the requisite circumstances—which petitioner defines in much the same terms as the Court of Appeals—were, as a matter of fact, not established here.

A. The "Swift" Issue

Petitioner states that one of the questions presented is whether "the traditional standard for dissolution of injunctive decrees involving private wrongdoers . . . govern[s] the dissolution of school desegregation decrees." Pet. Br. at i. *Amicus* DeKalb County Board of Education poses the question in similar terms. *See* Brief of the DeKalb County Board of Education as *Amicus Curiae* in Support of Petitioner ("DeKalb Br.") at i. Yet when all is said and done, neither petitioner nor its *amicus* ultimately contends that the standards for dissolution of an injunction that have been articulated by this Court in antitrust cases such as *United States v. Swift & Co.*, 286 U.S. 106 (1932) and *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968),

are inapplicable to school desegregation cases. *See* Pet. Br. at 35; DeKalb Br. at 17-18.[5] They argue rather that *Swift* should only be applied "as subsequently clarified by . . . *United Shoe Machinery Corp.*" Pet. Br. at 35. *See also* DeKalb Br. at 17-18. According to petitioner, *United Shoe* indicates that the strict test stated in *Swift*—*i.e.*, "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change [the decree]," 286 U.S. at 119—is simply a way of saying that an injunction should not be terminated "if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." Pet. Br. at 36, quoting *United Shoe*, 391 U.S. at 248. *See* also DeKalb Br. at 18.

Whether petitioner's parsing of *United Shoe* is correct poses a difficult question, which is in no way unique to school desegregation cases but has vexed the lower courts in a wide range of contexts. *See* 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2961 at 601-03 (1973) (discussing divergent views as to whether, after *United Shoe*, a defendant seeking dissolution of an injunction must show both that the need for the injunction has disappeared *and* that the injunction is causing grievous harm). But that question is not presented here, because the Court of Appeals did *not*, as petitioner and its *amicus* wrongly assert, hold that a

[5] Nor could such an argument succeed. *Swift* and its progeny establish general principles respecting "the power of a court of equity to modify an injunction," *Swift*, 286 U.S. at 114; and "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16. Accordingly, as the Solicitor General correctly puts it, *Swift* "is no less applicable in the specific context of desegregation orders." Brief for the United States as Amicus Curiae ("U.S. Br.") at 18 n.7. *See Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 437 (1976) (invoking the "well-established rules governing modification of . . . a final decree entered by a court of equity," and citing *Swift*.)

school desegregation decree must continue after "the original constitutional violation has been remedied." DeKalb Br. at 2. *See also id.* at 7 ("In sum, the Tenth Circuit found that proof that a desegregation decree had successfully achieved its goal of eliminating discrimination root and branch was not a sufficient basis to dissolve an injunction"); Pet. Br. at 17-19, 36 (characterizing the decision below in similar terms). On the contrary, *the Tenth Circuit stated that the decree could be vacated if it were shown that "the condition the order sought to alleviate, a constitutional violation, has been eradicated."* Pet. App. 14a (emphasis added). *See also* Pet. App. 17a (decree may be modified or vacated if "a court determines the injunction in current form is no longer necessary to achieve the court's original objective").

Thus, the test proposed by petitioner and its *amicus*—*viz.*, that a school desegregation decree may be vacated once " 'the purposes of the litigation' as incorporated in the decree ha[ve] been 'fully achieved,' " Pet. Br. at 36, quoting *United Shoe*, 391 U.S. at 248 (or, as *amicus* DeKalb County puts it, "where the purpose of the injunction has been met and intentional (*de jure*) segregation and the effects of past intentional segregation have been eliminated," DeKalb Br. at 18)—is not inconsistent with the Tenth Circuit's analysis in this case. That court simply determined—correctly, as we show in Part II—that the constitutional violation has *not* been fully remedied and that an injunction therefore continues to be necessary.

B. The Consequences of a Determination of Unitary Status

For precisely the same reason, this case does not present the question posited by petitioner as to whether a desegregation decree "[s]hould . . . remain operative after a formerly *de jure* system achieves unitary status." Pet. Br. at i.

Petitioner's argument that "once a school system achieves a final declaration of unitary status . . ., then it is entitled to have the entire desegregation decree lifted," Pet. Br. at 27-28, rests on the following proposition: "[s]ince unitariness signifies the elimination of unlawful discrimination and its effects from a school system, it by definition means that the previous constitutional violation has been corrected." *Id.* at 18. *See also* DeKalb Br. at 18-19 ("Th[e] determination of whether a school system has become unitary . . . [turns on whether] the purpose of the injunction has been met and intentional (*de jure*) segregation and the effects of past intentional segregation have been eliminated"); U.S. Br. at 25 ("a school district seeking to be declared unitary must demonstrate that it has eliminated the vestiges of its prior acts of discrimination"); Brief *Amici Curiae* of the Council of Great City Schools, *et al.* ("Great City Schools Br.") at 11 (school district is not unitary until "the identified vestiges of segregation have been eliminated to the maximum extent practical").

Thus, petitioner couches its definition of unitariness in the same terms as it employs in describing the circumstances in which, under *Swift* and *United Shoe*, a court may dissolve a decree. *See supra* at 5-7. And properly so; for, as *amici* Great City Schools, *et al.*, correctly observe, "[t]he *Swift* issue and the unitariness issue are . . . fundamentally the same: has the condition necessitating judicial intervention been fully cured." Great City Schools Br. at 7. As we have seen, that is precisely the formulation articulated by the Tenth Circuit in this case; the Court of Appeals simply determined that the condition necessitating judicial intervention had *not* been fully cured.

In sum, the dispute that animates this case is not any question as to the standard that should govern requests for termination of a school desegregation decree. Despite much breast-beating by petitioner and its supporting

amici, the standard they articulate and the standard set forth by the Court of Appeals are essentially the same. What divides the parties is whether, on the facts here, that standard was correctly applied. Because this is not a question on which certiorari was sought and granted, we submit that the writ should be dismissed as improvidently granted.

II. THE QUESTION WHETHER THE COURT OF APPEALS PROPERLY ASSESSED THE EXTENT TO WHICH VESTIGES OF UNLAWFUL SEGREGATION STILL PERSIST IN THE OKLAHOMA CITY SCHOOLS IS NOT PROPERLY PRESENTED BY THIS CASE. BUT IF THE COURT WERE TO REACH THAT QUESTION, THE DECISION OF THE COURT OF APPEALS WAS CORRECT AND SHOULD BE AFFIRMED.

A. The Posture of the Case

Petitioner and its *amici* read the District Court's decision as having found that in the five years between 1972 and 1977, the situation in Oklahoma City was transformed from one of "racial[ly] identi[fied] . . . schools" and "unpardonable recalcitrance," *Dowell v. School Bd. of Oklahoma City*, 338 F. Supp. 1256, 1271 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), to one in which "the effects of past discrimination ha[d] been eliminated," Pet. Br. at 18. *See also* DeKalb Br. at 8 ("'all vestiges of prior state-imposed segregation had been completely removed' from the school system by 1977"). The Court of Appeals reversed that finding as clearly erroneous because "*on the entire evidence* [it was] 'left with the definite and firm conviction that a mistake has been committed.'" Pet. App. 41a (emphasis by the court), quoting *United States v. United States Gypsum Co.*, 333 U.S. 363, 395 (1948).

Lurking in this disagreement between the two courts below is a question as to the significance of continued

residential segregation in determining whether a school desegregation decree should be terminated. This is a difficult and sensitive question which, we submit, the Court should not reach in this case. In addition to the fact that the question was not raised in the Petition for Certiorari, it was, as the following brief recapitulation of the District Court's decision indicates, essentially bypassed by that court.

In its first decision in this case, the District Court correctly observed that the central problem to be confronted in desegregating the Oklahoma City schools was that, as a result of intentional governmental action, *see Dowell v. School Bd. of Oklahoma City Public Schools*, 219 F. Supp. 427, 433-34 (W.D. Okla. 1963), "[t]he Negro people had been segregated so completely in their residential pattern," *id.* at 434. When, two years later, the court rejected petitioner's initial effort to adopt a "neighborhood school" policy, it did so because "a neighborhood school policy . . .. when superimposed over already existing residential segregation initiated by law in Oklahoma City, leads inexorably to continued school segregation." *Dowell v. School Bd. of Oklahoma City*, 244 F. Supp. 971, 976 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967). The court emphasized that the "ghetto confinement of Negroes" in Oklahoma City, *id.* at 975 n.1, was "neither accidental nor fortuitous, but the result of laws requiring segregation in housing and education." *Id.* at 976. *See also id.* at 977 (noting that actions of the School Board had "serve[d] to . . . extend[] areas of all Negro housing, destroying in the process already integrated neighborhoods and increasing the number of segregated schools"). And, in 1972, when the District Court approved the Finger Plan, it found that the "racial identity of the schools" still remained, because of "the unpardonable recalcitrance of the defendant Board and the Superintendent of Schools to come forward with a constitu-

tional plan for the desegregation of the schools of this District." *Dowell*, *supra*, 338 F. Supp. at 1271.

In its most recent decision, issued on December 9, 1987, the District Court found that blacks are no longer forced by law or official policy to live in particular areas of Oklahoma City. According to the Court, the primary reason "why the east inner-city area in Oklahoma City [which the court had characterized as a "ghetto" in 1965] remains predominantly black today," Pet. App. 17b, with the result that petitioner's "neighborhood school" policy consigns 44.7% of the district's black students in grades 1-4 to schools with enrollments greater than 90% black,[6] is "personal preference," Pet. App. 17b. More precisely, what the court found is that "[a]s a result of personal preference, very few white families moved into the east inner-city area," *id.*

The District Court abandoned the inquiry at that point, as if the conclusion that "personal preferences" are at work forecloses any possibility that the present residential segregation is a vestige of governmental discrimination. What the court failed to consider is the obvious possibility, which is supported by the record in this case, *see infra* at 18, that the reason why white families have been unwilling to move to the northeast sector of Oklahoma City *is* that sector's status as a black ghetto—a status conferred by official action. To the extent that this is so, "personal preferences" produce residential segregation only because they are operating in a context where governmental discrimination has skewed the situation in the first place. Seen in this light, the notion that a school district can never be held accountable for the effects of "personal preferences" is simply a revival of the discredited notion that a school district can never be held responsible for the consequences of "freedom of choice." *See, e.g., Green v. County School Board*, 391 U.S. 430, 437 (1968).

---

[6] *See* Plaintiffs' Exhibits 26 and 27.

Thus, the real question in this case is whether and to what extent the segregation flowing from the "personal preferences" to which the District Court referred is itself a vestige of the prior *de jure* segregation that the decree was designed to remedy. Because the District Court failed even to acknowledge—much less address—this question, the instant case provides a particularly poor vehicle for this Court to consider the significance of continued residential segregation in determining whether a school desegregation decree should be terminated. Should the Court conclude otherwise, however, and choose to address the matter, we set forth below the basic principles that we believe should govern the inquiry.

B. The Governing Principles

1. In crafting and administering school desegregation decrees, "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation," *Swann*, 402 U.S. at 15, and to do so "root and branch," *Green*, 391 U.S. at 438. As we have discussed, petitioner and its *amici* do not dispute that a desegregation decree should remain in force until this has been accomplished. *See supra* at 7-8.

2. It hardly can be denied that where residential segregation is traceable to official action, and a "neighborhood school" policy superimposed over that segregation results in consigning blacks to schools that are virtually all-black, the vestiges of discrimination have not been eliminated as required by *Swann* and *Green*. *See* Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728, 793 (1986). After all, the problem that gave rise to the initial decree in this case—as in *Swann* itself and in other cases such as *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33 (1971)—was that although *de jure* segregation had been abandoned, "[t]he Negro people had been segregated so completely in their residential pattern," *Dowell*, 219

F. Supp. at 434, that a neighborhood school policy would inevitably produce segregated schools. *See supra* at 10-11. If residential segregation stems from governmental action —be it that of the State or of the school district itself [7]—

[7] This Court has recognized that "school desegregation is a contributing cause of housing segregation," *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979), and that the actions of school officials may have "a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration in the schools." *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 202-03 (1973). *Accord, Swann*, 402 U.S. at 20-21. *See* U.S. Br. at 27. The District Court found in its 1965 decision that this phenomenon has been at work in Oklahoma City. *See supra* at 10. However, we hasten to add that this Court has never held that only the discrimination of school officials themselves, and not the discrimination of state or local governments, is relevant in this regard; and we submit that if residential segregation is caused by the action of *any* governmental entity a federal court is well within its power in prohibiting a school board from applying a neighborhood school policy under which that governmentally-fostered residential segregation will result in school segregation. In *Swann*, for example, the remedies of alteration of attendance zones and busing that were affirmed by this Court, 402 U.S. at 27-31, had been adopted on the basis of "[findings] that residential patterns leading to segregation in the schools resulted in part from *federal, state and local* governmental action." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138, 141 (4th Cir. 1970) (*en banc*) (emphasis added). Although this Court, in affirming those remedies, "[did] not reach . . . the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree," 402 U.S. at 23, neither this Court nor the lower courts in *Swann* found it necessary to determine *to what extent* the segregation at issue resulted from action of the school board rather than from other "federal, state and local governmental action," 431 F.2d at 141. Particularly in the case of discrimination by state and local governments which, while technically distinct from a school district, have a close relationship to and exert a strong influence on the district, there is no sound basis for holding that segregation caused by state or local authorities rather than by school authorities as such is beyond the pale of

a court plainly must adopt appropriate measures to ensure that it does not result in segregated schools. *See, e.g., Swann, supra; Davis, supra.*

3. To be sure, it often will be difficult to determine whether, and to what extent, a present pattern of segregation stems from past governmental action. But this Court's precedents make clear that the burden of proof is on a school district that has previously maintained a dual system to ests[a]blish that the present composition of the schools is not a result of the past discrimination. "[I]n a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." *Swann*, 402 U.S. at 26. What the Court stated in *Keyes, supra*, with respect to an initial determination of liability, applies *a fortiori* in this context:

> In *Swann*, we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention.
>
> * * * *
>
> We made it clear, however, that *a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist.* Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if *respondent School Board*

remedy in a school desegration case; and the remedies affirmed by this Court in numerous cases, including *Swann* and *Davis*, cannot be squared with such a proposition. If any doubt remains on this score, it should not be resolved in *this* case, where the matter has not been raised, and apparently will not be briefed, by the parties.

> cannot disprove [past] segregative intent, it *can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.* [413 U.S. at 210-11 (emphasis added)]

See also Dayton Bd. of Education v. Brinkman, 443 U.S. 526, 537-38 (1979) ("the systemwide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts").[8]

4. These principles do not improperly infringe on the interest of a school district in maintaining a policy of neighborhood schools. "All things being equal, *with no history of discrimination*, it might well be desirable to assign pupils to schools nearest their homes," *Swann*, 402 U.S. at 28 (emphasis added); but where neighborhood schools perpetuate the effects of past governmental discrimination, relief is warranted, *id. See also, e.g., Davis v. School Comm'rs, supra.*

[8] In this connection, petitioner misrepresents the position of Justice Stewart when it quotes out of context the statement in his separate opinion in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) that "[a]n easily visible correlation between school segregation and residential segregation cannot by itself justify the blanket extension of a remedy." Pet. Br. at 41, quoting 443 U.S. at 478-79. Read in full, the passage to which petitioner refers does not support its position and is completely consistent with what we have stated in text:

> An easily visible correlation between school segregation and residential segregation cannot by itself justify the blanket extension of a remedy throughout a district. As *Dayton I* made clear, unless a school was affected by the violations, it should not be included in the remedy. I suspect the *defendants* in *Columbus might have been able to show that at least some schools in the district were not affected by the proved violations.* Schools in the far eastern or northern portions of the district were so far removed from the center of Negro population that the unconstitutional actions of the board may not have affected them at all. *But the defendants did not carry the burden necessary to exclude those schools.* [*Id.* (emphasis added).]

No one would deny the importance of allowing local authorities to manage the schools without *unwarranted* judicial involvement; but where governmental discrimination, even "remote[] in time," *Keyes*, 413 U.S. at 210, is responsible for the fact that a black student must attend a virtually-all-black school, a grievous constitutional wrong is inflicted. This Court has recognized that "minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 472-73 (1982). *See also Milliken v. Bradley*, 433 U.S. 267, 288 (1977). This does not mean that a federal court is free to require racially balanced schools where governmental discrimination is not the cause of an imbalance. *Spangler, supra; Swann, supra.* It does mean, however, that where a school district with a history of *de jure* segregation cannot adequately rebut the presumption that present segregative conditions are attributable to the past governmental wrongs, *see supra* at 14-15, a federal court should not hesitate to fashion a remedy.[9] One thing, at least, is worse than continued judicial involvement in the affairs of a school district, and that is for children to be deprived of the benefits of interracial education, and rendered unable to "achieve

[9] In *Swann*, the Court stated that in a system with a history of segregation, even "the existence of some *small number* of one-race, or virtually one-race, schools within a district," while not "in and of itself" unconstitutional, places on the district a burden of showing that the racial composition of the schools is not the result of present *or past* discrimination. 402 U.S. at 26 (emphasis added). Oklahoma City is operating a *significant* number of virtually one-race schools: indeed, as respondents have pointed out, the pattern of one-race schools that exists today is virtually identical to the pattern that existed when, earlier in the litigation, the District Court properly refused to allow a "neighborhood school" plan. And, petitioner has not made the showing required by *Swann* to justify such a situation.

their full measure of success," *Washington v. Seattle School Dist.*, 458 U.S. at 472, because of the continuing effects of governmental discrimination.

5. Nor do these principles call for decrees of inordinate duration; and there may well come a point when the link between residential segregation and past governmental discrimination, while not entirely broken, is so "attenuated" that a remedy is no longer warranted. *See supra* at 14-15, quoting *Swann* and *Keyes*. Petitioner failed to show, however, that this is such a case.[10]

[10] *See supra* note 9. The Solicitor General asserts, with particular reference to residential segregation, that "[w]here a school board has (1) faithfully complied with a decree over a continuous period, (2) engaged in no new discriminatory practices, and (3) eliminated the vestiges of discrimination in all of the areas identified in *Green*, the strong presumption should be that any further 'vestige' of discrimination has been attenuated." U.S. Br. at 28-29. We see no basis for any such presumption, "strong" or otherwise. That a school district has complied with a decree and has refrained from new acts of discrimination provides no reason to assume that residential segregation resulting from prior governmental discrimination has been "attenuated." As for the *Green* factors, they also shed no light on this question. The most relevant of the *Green* factors in this regard is "the composition of student bodies," 391 U.S. at 435. In *some* cases, the fact that student bodies have become racially mixed may suggest that prior governmentally-initiated residential segregation has dissipated. But in this case, to the extent that the elementary schools in the northeast sector were racially mixed at the time of the District Court's "unitariness" finding, this was largely due to busing, and it was a moral certainty that one-race schools would be restored as soon as busing ended (at least if no other remedy were fashioned). We are hard-pressed to see how a finding that student populations have become racially mixed can support a determination of "unitariness" justifying dissolution of a decree where the mixing results only from the very provisions of the decree that the school district seeks to vacate. After all, the moment a district begins to comply with a busing order, student populations become racially mixed. If such a condition were sufficient to support a finding of unitariness, desegregation decrees would immediately self-destruct. And in all events, whatever may be the legal consequence of a school district's compliance with a busing order, there is no

To the contrary, although the District Court made no findings regarding the extent to which the "personal preferences" that account for the residential segregation in Oklahoma City today produce that result only because of past *de jure* segregation, the evidence with regard to this issue (as to which petitioner bears the burden of proof, *see supra* at 14-15) suggests, if anything, that the connection is strong. Thus, petitioner's own witness, upon whom the District Court chiefly relied in discussing the role of these preferences, testified as follows:

> Q. And does it not therefore follow that, *to the extent past discrimination was a factor* in establishing concentrated minority residential areas, that those areas are unlikely to change because of the antipathy of whites to moving in unless and until their black residents move somewhere else?
>
> A. I think that you would have to agree with that, given what I've testified. Yes.[11]

In short, the record supports, and *nothing in the District Court's findings rejects*, the following chain of events: (1) a black ghetto was created in the northeast sector of Oklahoma City *through governmental action*,[12] (2) precisely because it *is* a black ghetto, whites, due to "personal preferences," have been and remain unwilling to move into that area of the city, and (3) *as a result*, if petitioner's "neighborhood school" policy is carried out

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basis in fact or logic for the Solicitor General's suggestion that such compliance should support a presumption that residential segregation, or other vestiges of discrimination, have been "attenuated."

[11] Transcript p. 107 (emphasis added). *See also id.* at 1231-32 (testimony of Professor Mary Lee Taylor) ("[I]n places like Oklahoma City, where the black neighborhood was created by state action . . ., white avoidance of desegregation would be particularly great for that reason. In other words, the official segregation encourages attitudes . . . that it . . . would be undesirable for whites to live in predominantly black neighborhoods.")

[12] *See supra* at 10-11.

and no countervailing injunctive relief is effectuated, black children living in the government-created ghetto will once again be sent to schools attended almost exclusively by one race.

To say that this governmentally-fostered segregation is no longer of any legal relevance because it continues to have effect only by operation of "personal preferences" is to argue nothing more nor less than that "freedom of choice" puts an end to the duty to desegregate. This Court's desegregation jurisprudence is dead set against that notion. *Green*, *supra*.

For these reasons, if the petition for certiorari is not dismissed as improvidently granted and if the Court addresses the issue of residential segregation, it should affirm the decision below on the ground that petitioner failed to carry its burden of proving that the resegregation of Oklahoma City's elementary schools is not the result of the past governmental discrimination that was established in the earlier stages of this litigation.

CONCLUSION

The petition for certiorari should be dismissed as improvidently granted. If the petition is not dismissed, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 89-1080 (15)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE CITIZENS' COMMISSION ON CIVIL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici curiae will address this question:

Where school segregation has substantially contributed to housing segregation, must the school district show that it has taken effective action to correct the housing "vestiges" of the district's wrong before the district's remedial obligation is fulfilled?

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INTEREST OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership corporation with substantial numbers of members nationwide. The NAACP has chartered affiliates in the State of Oklahoma and in the other forty-nine states. The principal goal of the NAACP is to insure the political, educational, social, and economic equality of African-

American citizens of the United States and to remove all barriers of racial discrimination.

This case, involving as it does the question of when a school system may properly be deemed "unitary" and, consequently, relieved of its obligation to remedy school segregation, when the vestiges of discrimination, including housing segregation, remain, is of paramount concern to the NAACP. *Amicus* NAACP has been in the forefront of litigation seeking effective desegregation of public school systems since *Brown v. Board of Education*, 347 U.S. 483 (1954). The NAACP has been particularly concerned about the intersection of housing and school segregation and has undertaken significant litigation in this area such as the *Yonkers* case. Because this case is likely to have a significant impact on the NAACP's on-going efforts to achieve desegregation, the NAACP is participating as *amicus curiae*.

INTEREST OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS

The Citizen's Commission on Civil Rights is a bipartisan group of former officials who have served in the federal government in positions with responsibility for equal opportunity and civil rights. Its membership includes two former Secretaries of the Department of Health, Education and Welfare (now Department of Education) and several former officials of the Department of Justice, the two federal agencies with prime responsibility for enforcing constitutional and statutory rights to equal educational opportunity.[1] The Commis-

[1] The members of the Commission include Arthur Flemming, Chair; William L. Taylor, Vice Chair; Birch Bayh, William H. Brown, Frankie Freeman, Erwin N. Griswold, Aileen C. Hernandez, Fr. Theodore M. Hesburgh, Ray Marshall, William M. Marutani, Eleanor Holmes Norton, Elliot L. Richardson, Rabbi Murray Saltzman and Harold M. Tyler.

sion was founded in 1982 in response to governmental action that put into question the basic foundations of civil rights policy as it had operated since the enactment in the 1960's of laws providing basic protections. Since its establishment, the Commission has monitored civil rights enforcement, examined important policy issues affecting equality of opportunity, and published reports on a broad range of civil rights issues.

In several of its reports, the Commission has examined issues concerning school and housing segregation. These include a 1982 study of school desegregation remedies which examined social science evidence on the educational benefits of school desegregation; a 1983 study of housing segregation in large cities, reviewing federal housing enforcement efforts by the Departments of Justice and Housing and Urban Development; and a 1989 study analyzing the record of civil rights enforcement by federal agencies during the 1980's and providing a comprehensive series of recommendations for policy changes to ensure effective implementation of civil rights laws, including recommendations concerning findings of "unitary status" in school desegregation cases.

The present case raises important questions concerning the termination of a school board's obligation to remedy segregation. In light of both the Commission's continuing interest in the issue of when a school district should be deemed to have achieved "unitary status," and the Commission's expertise on housing discrimination and school segregation, amicus is vitally interested in the determination of the issues in this case. In addition, amicus believes it can be of service by bringing to the attention of the Court the important relationship between housing segregation and school segregation.[2]

[2] Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of the letters of consent from the parties have been filed with the Clerk of the Court.

STATEMENT

The schools of Oklahoma City were intentionally segregated by race for at least three generations before this lawsuit. 219 F.Supp. 427, 431-34 (W.D. Okla. 1963) ("at all times since statehood [in 1907] the Oklahoma City School District was completely and fully segregated"). Housing was also segregated, partly by state law and state enforcement of restrictive covenants, but partly as the result of the longstanding school segregation. *Id.* at 433-34; 244 F.Supp. 971, 975-77 (W.D. Okla. 1965). Even when explicitly-sanctioned school segregation ended, the establishment of neighborhood schools resulted in virtually complete segregation of blacks, particularly in the central east part of the City. The area of black residential concentration grew due to the district's student assignment, transfer, and other policies. *Id.*

In 1972, the District Court ordered that the schools be desegregated and approved a comprehensive systemwide plan. 338 F.Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). This followed the District's "unpardonable recalcitrance," *id.* at 1271, and "emasculat[ion]" of prior plans. *Id.* at 1263. Five years later the Court terminated jurisdiction over the lawsuit but did not vacate the prior injunction. No. CIV-9452, slip op. (W.D. Okla. Jan. 18, 1977); *see* 795 F.2d 1516, 1518 (10th Cir. 1986), *cert. denied*, 479 U.S. 938 (1987). A dozen years after the school district's desegregation effort began, the district essentially returned to neighborhood elementary schools. Because much residential segregation remained, many schools, particularly in the central east section, returned to their prior segregated status. 677 F.Supp. 1503, 1506-10 (W.D. Okla. 1987), *rev'd*, 890 F.2d 1483 (10th Cir. 1989).

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses the following issue: Where school segregation has substantially contributed to housing segregation, must the school district show that it has taken effective action to correct the housing vestiges of the district's wrong before the school system's remedial obligation is fulfilled? The answer, as a matter of common sense and the Court's decisions, is yes. The answer ought not to be altered by the fact that effective action to remedy the segregative housing effects of school segregation might be a difficult or time-consuming process. To hold otherwise, especially in the context of a school district's effort to return to "neighborhood schools," which will be racially segregated by virtue of earlier discriminatory practices, would be to render the whole desegregation process unavailing. School segregation does in fact cause residential segregation, and both can—and must—be remedied.

ARGUMENT

I. THE COURT HAS FIRMLY ESTABLISHED THAT RESIDENTIAL SEGREGATION IS A VESTIGE OF RACIALLY-DUAL SCHOOL SYSTEMS

The Court realized early in the history of *Brown* that school segregation frequently contributes to residential segregation and that segregated neighborhoods typically produce segregated schools. Each form of segregation is both the root and the branch of the other. The mutually-causative nature of the two forms of segregation means that addressing one can help address the other but that correcting one might not immediately correct the other. As the Court noted in *Swann*, school assignments are, in isolation, "short-run" problems, but they may "promote segregated residential patterns which . . . lock the school system into the mold of separation of the races." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971). In *Keyes v. School*

District No. 1, 413 U.S. 189 (1973), the Court observed that school segregation:

> ha[s] the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

Id. at 202-03.

In the Court's most recent case in this area, *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), the Court agreed that "school segregation is a contributing cause of housing segregation." *Id.* at 465 n.13. The decision of the District Court in *Columbus*, affirmed and in this regard referred to approvingly by this Court, described the interaction of school assignments and residential choice as a "segregative snowball." [3] Numerous lower

[3] In *Columbus*, the Court was persuaded by evidence that the District Court summarized as follows:

> The racial identification of the school in turn tends to maintain the neighborhood's racial identity, or even promote it by hastening the movement in a racial transition area. White families tend to cease migrating into such a neighborhood, and tend to move out of the area.
>
> The Court has received considerable evidence that the nature of the schools is an important consideration in real estate transactions, and the Court finds that the defendants were aware of this fact. The defendants argue, and the Court finds that the school authorities do not *control* the housing segregation in Columbus, but the Court also finds that the actions of the school authorities have had a significant impact upon the housing patterns. The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required.
>
> I do not suggest that any reasonable action by the school authorities could have fully cured the evils of residential segregation. The Court could not and would not impose such a duty upon the defendants. I do believe, however, that the Columbus defendants could and should have acted to break the segregative snowball created by their interaction with housing. That is, they could and should have acted with an integrative rather than a segregative influence upon housing; they could and should have been cautious concerning the segregation influences that are exerted upon the schools by housing. They certainly should not have aggravated racial imbalance in the schools by their official actions.

429 F.Supp. 229, 259 (S.D. Ohio 1977).

federal courts in school desegregation cases have grappled with the issue of school segregation and its impacts on residential segregation, frequently finding school districts responsible for influencing homebuyers' decisions concerning where to move and exacerbating segregated housing patterns.[4]

The United States suggests that, where, as here, intentional school segregation substantially contributed to residential segregation, the courts should presume that remedial efforts "over a continuous period" in the school-related areas set forth in *Green* have remedied all school-related housing segregation. Brief for the United States as Amicus Curiae at 28. Although not directly stated, the facts of this case suggest that the period that the United States would require is no more than a dozen years or so, even where the intentional school segregation lasted four or five times as long.

This approach turns upside down the common sense rules that the Court has recognized over the years with

[4] *See, e.g., United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *United States v. Board of School Commissioners*, 573 F.2d 400, 408-09 n.20 (7th Cir. 1978); *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1049 n.9 (6th Cir. 1977); *Evans v. Buchanan*, 393 F.Supp. 418, 436-37 (D. Del.), *aff'd*, 423 U.S. 963 (1975); *Hart v. Community School Board of Brooklyn*, 383 F.Supp. 699, 706 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

respect to burdens of proof and presumptions in desegregation cases. It understates the link between school and residential segregation—and desegregation as well. And even where, as here, the link has been proven in fact, the position of the United States places on the innocent victims the burden of proving that an effect caused by many years of school segregation was not undone by a relatively few years of school desegregation. Satisfying that burden would be an expensive and unnecessary task, even though in almost every case it could be done if the resources were available. The fact that a long and painful constitutional violation results in conditions that may require a remedy of similar duration is no justification for effectively denying the remedy to innocent victims.

Changing the pattern of school assignments does not quickly break the mold of separation that such assignments have helped to create. Housing patterns contributed to by generations of school segregation will not be undone by a few years of desegregated school assignments. White (or black) parents are more likely to move into a black (or white) neighborhood if they have a long-term guarantee that their children will not be racially isolated in school while the much slower process of neighborhood integration continues. That level of comfort will not arise, however, if the commitment to desegregated schools is only for a limited time, or is apparently not in good faith, and many years must pass before the cumulative effect of such individual parental decisions can make a significant difference in vestigial residential patterns. In fact, if parents perceive that the commitment to school desegregation is transitory or insincere, they will tend to make the same housing decisions as if the schools still were intentionally segregated. Although explicit school segregation will have ended, continued residential segregation will be perpetuated.

A presumption, stated or otherwise, that a few years of effective school desegregation provide a complete constitutional remedy would make the effort of desegregating schools a futile and tragic one in those cities in which segregated schools and neighborhoods have caused and reinforced one another over a period of time spanning decades. Once the school desegregation effort ended, segregated neighborhoods once again would have segregated schools. The prior intentional school segregation, which caused a substantial part of the initial residential segregation, would still be causing a substantial part of the current school segregation. For a few years minority children would have attended desegregated schools, but future generations of minority children would be locked into schools that are segregated in fact, and whose condition arose in substantial part by virtue of intentional segregation in the past. Due to segregated schools, many parents of young children will make segregative housing choices or decline to make desegregative ones.

The end result would vary little from that under the "freedom of choice" plans that the Court confronted in *Green v. County School Board*, 391 U.S. 430 (1968). There the Court realized that ending explicitly segregative assignments would mean nothing if other "vestiges" of the prior system remained and caused a facially neutral assignment system to perpetuate prior state-imposed segregation. The Court, fully acknowledging the difficulty of the task, ordered that action be taken forthwith to eliminate the prior system and *all* of its effects. As the Court held in *Swann*, the fundamental objective is to eliminate "all vestiges" and to do so "root and branch," 402 U.S. at 15 (quoting from *Green*, 391 U.S. at 437-38). The six indicia of the dual system mentioned in *Green*—student assignment, faculty, staff, transportation, extra curricular activities, and facilities—are "*among* the most important indicia of a segregated system," *id.* at 18 (emphasis added), but the vestiges requiring elimination may include other critical areas:

> Discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequities, shown on the record, which flow from a longstanding segregated system.

Milliken v. Bradley (II), 433 U.S. 267, 283 (1977).

Ending improper motivation and explicit segregation in student assignments can be said to create an immediate form of "unitariness," but if that were enough, there would be no need for consciously desegregative assignments for any extended period of time. The Court has recognized, however, that the process of eliminating segregation and its injurious effects, "root and branch," takes many years. *Green*, 391 U.S. at 435-38; *Raney v. Board of Education*, 391 U.S. 443 (1968); *Swann*, 402 U.S. at 31-32. Consciously desegregative student assignments are necessary to end indirect effects such as the identification of certain schools as black or white and housing segregation. Those long-term effects of school segregation on parental/homeowner choice can be remedied only by a long-term and good faith commitment to desegregative student assignments as well as affirmative remedies designed to reverse years of segregated housing patterns.

II. EFFECTIVE SCHOOL DESEGREGATION, WITH PERSEVERANCE, CAN REMEDY HOUSING DESEGREGATION

The process of creating segregated schools and neighborhoods was, and is, slow and enduring. School desegregation has itself been a slow process, and the effect on housing patterns is much slower. Numerous examples, however, show that schools can be a cure for, as well as a cause of, segregated neighborhoods and that residential segregation is not as intractable a problem as might be supposed.

It is by now well known that desegregation of schools, by itself, can have a positive effect on housing desegregation, as indeed was recognized by the District Court here. 677 F.Supp. at 1513.[5] Just as school segregation causes housing segregation, studies and experiences confirm the common sense notion that if parents need not fear the racial isolation of their young children in school, they are more apt to make, or continue, desegregative housing choices and less apt to make segregative ones.

School systems can further speed the residential desegregation process by offering incentives and cooperating with other entities. The Pearce study found that cities with metropolitan school desegregation plans enjoyed increased residential desegregation, leading to de-

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[5] School desegregation can have long-term effects on residential segregation, but only if kept in effect for substantial periods of time. An extensive longitudinal study in Hartford, Connecticut, begun in 1966, found that when black students attend desegregated schools they are more likely as adults to live in non-segregated areas than their counterparts who attended segregated schools. *See* Crain, et al., *Finding Niches: The Long Term Effects of a Voluntary Interdistrict School Desegregation Plan* (New York Teachers College 1986). When a school district is desegregated there is no pressure for whites with young children to move out of racially mixed neighborhoods, and it is less likely for real estate agents to engage in racial steering to segregate neighborhoods. *See* Hawley, et al., *Assessment of Current Knowledge About the Effectiveness of School Desegregation Studies*, Vol. 1, pp. 51-60 (Institute for Public Policy Studies, Vanderbilt University, 1981). Another study notes that real estate brokers typically use the racial characteristics of public schools to identify the neighborhood racially, and then market houses in neighborhoods along racial lines. Once schools are no longer earmarked as white or black, racial barriers in housing are lowered. *See* Pearce, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns* (Nov. 1980) (cited in *"There is No Liberty"* at 83-84 (Citizens Commission on Civil Rights 1982). *See also* Orfield, *Toward a Strategy for Urban Integration* (1981); Pearce, et al., *The Effect of School Desegregation on the Rate of Residential Desegregation in Large Central Cities* (unpublished 1990).

creased need for busing.[6] In Louisville[7] and a growing number of other cities, the school system offers a guarantee of a neighborhood school to families who move into a residential area in which they are in the minority.[8] In Milwaukee, Cleveland, and Seattle, school systems and state agencies have cooperated to make federal tax benefits, *see* I.R.C. §§ 25(c), 42, & 143, available to families with school-age children who make desegregative housing choices. In Palm Beach County, Florida, the school system works with developers of new housing to encourage desegregation of housing so that new schools will not be one-race. In many urban areas former school sites can be developed for mixed-income family housing. School systems also can encourage mitigation of the adverse impacts of school and residential segregation by city and county governments charged with zoning, planning, and development approval. They can assure awareness among realtors, landlords, housing authorities, recipients of HUD vouchers and Section 8 certificates, and lenders of incentives for desegregative residential choices and of the positive economic effects of stable, desegregated neighborhoods. These and other voluntary, inexpensive techniques are limited only by the imagination and by the degree of school officials' good-faith commitment to eradicating the proven effects of past intentional segregation.

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[6] *See* Pearce, *Breaking Down Barriers, supra*, note 5.

[7] For a discussion of the impact of the exemption from busing for those moving into desegregated areas in Louisville, see Kentucky Commission on Human Rights, *Six Ways to Avoid Busing* (1975); Kentucky Commission on Human Rights, *Housing and School Desegregation Increased by Section 8 Moves* (1980).

[8] This obvious strategy is ignored in too many cities. One sad example is Norfolk, Virginia, where pressure to dismantle a plan arose in part from black parents' dissatisfaction with moving to an integrated area, only to be inflexibly bused back to the black area instead of being permitted to attend a closer school.

III. THE COURT'S REMEDIAL STANDARDS REQUIRE THAT EFFECTIVE ACTION BE TAKEN TO REMOVE HOUSING VESTIGES OF SCHOOL SEGREGATION BEFORE A DESEGREGATION PLAN CAN BE UNDONE

School segregation can, as it did here, cause residential segregation, which in turn leads to further school segregation. The "segregative snowball," however, can be stopped and even reversed. Accordingly, the proper remedial rule is unremarkable. Where school segregation has substantially contributed to residential segregation the school district must show that it has remedied that "vestige." If some schools remain segregated in fact under a neighborhood assignment policy, then the district bears a "heavy burden" of proving that the segregation has not been caused or contributed to by the earlier constitutional violation. *See Swann*, 402 U.S. at 26; *Keyes*, 413 U.S. at 203, 211, 214. As the Court held in *Dayton* and *Columbus*, it is not enough for the school board to abandon discriminatory purpose, the board "has an affirmative responsibility to see that pupil assignment policies and [other] practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'" *Dayton v. Brinkman (II)*, 443 U.S. 526, 538 (1979) (quoting *Columbus*, 443 U.S. at 460). That standard applies regardless of the specific effect that was caused and regardless of remoteness in time of the violation:

> If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make these actions any less intentional.

Keyes, 413 U.S. at 210-11.

It is not necessary for the Court to decide now what quantum of residential desegregation must occur before a school district can meet its burden of showing that it

has taken effective action to deal with the housing vestiges of a racially dual school system. Nor is it incumbent on the Court or on lower federal courts to undertake the impossible task of ascertaining how much residential segregation might remain if the effects of prior discriminatory practices in education were removed. Far more can be accomplished during school desegregation plans to eliminate vestigial housing segregation than has been achieved in Oklahoma City.

If there is to be any presumption or burden-shifting in *favor* of the school district, it should only be if the district entered into a desegregation plan that had no suggestion of future termination (short of the undoing of residential patterns), carried out that plan aggressively and in good faith, and implemented it for an extensive period of time. Absent all of these factors, the school system should be required to prove in fact that any remaining residential segregation in the area affected by prior school segregation is somehow unrelated to that prior school segregation. The requirements of an indefinite term at the outset and of good faith implementation are necessary because otherwise parents will not make residential choices in light of current desegregated school assignments. An extensive period of time is necessary because many separate parental decisions must occur before the cumulative effect is significant.

In this case, the record shows that the housing segregation vestige is not "theoretical[]", Brief for the United States as Amicus Curiae at 27, but real. The District Court found in 1965 that:

> inflexible adherence to the neighborhood school policy in making initial assignments serves to maintain and extend school segregation by extending areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools.

244 F.Supp. at 976-77. After continued "unpardonable recalcitrance" by the Board, 338 F.Supp. at 1271, and the Board's "emasculat[ion]" of prior plans, *id.* at 1263, a comprehensive systemwide remedy was ordered in 1972, eighteen years after *Brown* and sixty-five years after statehood. "The Defendant School Board shall not alter or deviate from the New Plan without the prior approval and permission of the court." *Id.* at 1273. Although the District Court recognized in 1985 and 1987 that school desegregation had "fostered the neighborhood integration which has occurred in Oklahoma City", 677 F.Supp. at 1512; *see also* 606 F.Supp. 1548, 1551 (W.D. Okla. 1985), that integration came from blacks moving into formerly white areas. Black residential areas that were "the result of laws requiring segregation in housing and education", 244 F.Supp. at 976, and that had expanded through 1972 due to the Board's continued recalcitrance, are still virtually one-race.

The District Court's statement in 1987 that "[f]rom the time of this court's original decision in this case over 25 years ago, the Oklahoma City Board of Education has taken absolutely no action which has caused or contributed to the patterns of the residential segregation which presently exists in areas of Oklahoma City," 677 F.Supp. at 1512, is thus at variance with its earlier opinions: The area of black residential concentration that resulted from the Board's policies is virtually untouched, in spite of the positive effects of school desegregation on housing desegregation elsewhere in the system. The District Court's determination that the Board "is not responsible for the present state of residential segregation in Oklahoma City," *id.* at 1512, is clearly erroneous in its disregard of the plain facts and the governing principles reviewed above. The relationship between past segregative acts and present segregation is in no sense of the words "attenuated" or "remote"; rather, it is direct and continuing.

In sum, for the better part of a half century prior to *Brown* public officials in Oklahoma City pursued policies that produced racial segregation in schools and housing. After *Brown*, until 1972, those officials took no effective action against school and housing segregation. From 1972 until 1985, the school board pursued more effective school remedies, but none of the affirmative housing measures of the kind described earlier. Since 1985 there has been regression as to school segregation.

Accordingly, whether or not—as respected *amici* suggest, *see* Brief of United States as Amicus Curiae at 22; Brief of The Council of the Great City Schools, et al., as Amicus Curiae at 11-14—"good faith" is an appropriate measure of remedial efforts, the actions taken in Oklahoma City has not persisted over a long enough period to ameliorate the longstanding violations. Here, although the district have been on explicit notice for twenty-five years or more than its policies and practices exacerbated residential segregation, the record reflects little or no effort on the part of the district to engage in any of the types of activities described above that would have accelerated elimination of school-related housing segregation. Surely this failure is significant in gauging the district's good faith.

* * * *

In recent years, much of the debate relating to our nation's sad legacy of discrimination has focused on affirmative action. That debate would ring hollow indeed if the Court were now to discontinue even the effort to provide a complete remedy for actual constitutional violations. The Court has required that the Constitution be vindicated even though the remedial course is difficult, unpopular, and lengthy. The path has been temporarily more difficult and time-consuming each time there was a belief that the Court might hesitate and perhaps turn back. Much is left to be done to remedy the conditions that took years to create. The Court should not look away from the effect of schools on housing.

If "[e]ach instance of a failure or refusal to fulfill [the] affirmative duty [to eliminate racial discrimination "root and branch"] continued the violation of the Fourteenth Amendment," *Columbus*, 443 U.S. at 459, then the Court, like the Board of Education of Oklahoma City, is duty-bound to address housing segregation that resulted in substantial part from school segregation.

The Court has steered a difficult but steady course over 35 years in an effort to make *Brown* a living reality for school children. That effort has yielded positive results. It ought not to be abandoned now, when the deleterious effects of the official regime of segregation persist.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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